

# **Political Regulation of EU Energy Markets: Companies from Third Countries**

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Supervisors: Panu Minkkinen &  
Heikki Pihlajamäki  
Author: Ben Talus  
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Tiivistelmä – Referat – Abstract  <p>This research paper covers the legal and political development of the EU energy market, specifically the development of third country company access to the EU internal natural gas market. It examines the legal and political aspects of legal developments relating to access by third country companies to the EU gas market, and certain hurdles and disputes that have contributed to the present state of the market.</p> <p>The research questions addressed by this paper are (1) how politics impact the development of access to the EU internal gas market for third country companies, and (2) whether the access rules can be interpreted as being discriminatory towards third country companies. The paper accordingly focuses on the treatment of third country companies that seek to access the EU market, and examines the EU's actions, in terms of blocking or hindering certain projects' entry into the market by treating individual actors differently from one another. It also examines the way in which politics have shaped the regulation of access to the EU gas market. In addressing these issues, the paper focuses on the legal cases concerning the Nord Stream 2 project and the 'Lex Gazprom' clause contained in the EU Gas Market Directive. It also assesses the relationship between law and politics in order to provide an in-depth examination of the impact of politics in shaping the EU gas market access rules for third country companies.</p> <p>The paper starts with an introduction to the EU energy law field and the natural gas market. This is followed by an explanatory section that covers the relevant EU and energy institutions that control the market. The emphasis is on the EU's legislative process and the relevant institutions, which are of importance to the assessment of the legal cases set out in chapter 4 of the paper. Chapter 3 examines the situation of third countries in the EU natural gas field in detail and focuses on their legal and political treatment. Chapter 5 answers the research question by assessing the case studies set out in chapter 4 and contextualising the findings of this exercise by reference to the underlying politics and EU and international law on certain legal issues.</p> <p>In addition to the legal and political assessment that it provides, the paper briefly addresses certain legal theories in order to measure the subject-matter of the assessment carried out against market objectives, such as how different actors' political goals should be handled in a legally and politically tense situation. This aspect of the paper entails assessment of the interaction between law and politics based on legal theory.</p>			
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## Abbreviations

ACER	EU Agency for the Cooperation of Energy Regulators
CEER	The Council of European Energy Regulators
CJEU	Court of Justice of the European Union
CoR	European Committee of the Regions
Coreper	Committee of Permanent Representatives in the European Union
Council	Council of the European Union
DG	Directorate-General
Commission	European Commission
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EEZ	Exclusive Economic Zone
ENTSO	The European Network of Transmission System Operators
ENTSOG	The European Network of Transmission System Operator for Gas
EP	European Parliament
EU	European Union
Gas Market Directive	Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IGA	Intergovernmental agreement
ITRE	European Parliament Committee on Industry, Research and Energy
Lex Gazprom / Gazprom Clause	Article 11 of the Gas Market Directive
Lex Nord Stream 2	Legislative amendment procedure initiated in November 2017 regarding the Gas Market Directive
LNG	Liquified natural gas
Member State	Member State of the European Union
MEP	Member of the European Parliament

MFN	Most-Favoured-Nation treatment as set out in the GATT and GATS agreements
NRA	National regulatory authority
Russia	Russian Federation
TEN-E	Trans-European network in energy infrastructure
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSO	Transmission system operator
TTE	The EU Council configuration on Transport, Telecommunications and Energy
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization

# 1 INTRODUCTION

## 1.1 Background

The aims of the European Union (EU) internal energy markets appear to be manifold. On the one hand, the applicable regulations safeguard market interests in the EU. On the other hand, energy is often linked to such issues as Member States' defence concerns and to wider political interests. Article 194 TFEU<sup>1</sup> regulates the EU's energy policies and sets out their objectives. These include ensuring the functioning of the energy market and security of supply and promoting energy efficiency as well as the functioning of energy networks.

This paper focuses on the legislation governing third country company access to the EU natural gas market. It identifies and assesses, from a legal and political viewpoint, specific regulations that impact on market access. Therefore, it does not comprise an assessment of the third-party access clause, which covers third party access to transmission and distribution systems, as laid down in Article 32 of Directive 2009/73/EC<sup>2</sup> (hereinafter the 'Gas Market Directive'), for example. Instead, it offers a broader assessment of the legal, political and market impacts of third country company access to the EU natural gas market. Since this is a vast and detailed area, the focus is on the legislative measures behind specific regulations currently in force. Accordingly, legislative material, literature and policy documents are used to examine and explain the fluctuating legal situation of third country companies operating in the EU natural gas market. Technical instruments, such as EU gas market network codes, and legal issues relating to market access to the internal gas infrastructure for EU Member State companies are excluded from the scope of the paper in order to ensure close focus on the legal and political aspects of the research question.

The EU is relatively dependent on pipeline gas from third countries. There are several reasons for this, including a lack of internal gas sources and the decline in its natural gas production.<sup>3</sup>

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<sup>1</sup> Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47).

<sup>2</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

<sup>3</sup> See Simon Frédéric, 'Europe grapples with Dutch gas production "collapse"', [2018] *Euractiv*, available at <https://www.euractiv.com/section/energy/news/europe-grapples-with-dutch-gas-production-collapse/> (last accessed on 22 June 2019); and Anouk Honoré, 'Natural gas demand in Europe in 2017 and short term expectations', *Oxford Energy Insight* 35, April 2018, Institute for Energy Studies, April 2018: <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/04/Natural-gas-demand-in-Europe-in-2017-and-short-term-expectations-Insight-35.pdf> (last accessed on 24 June 2019).

Given this dependency on third country gas sources, and the recent problems experienced by third countries in the EU energy field, this paper focuses principally on the regulations covering third country company access through cross-border pipelines. Since the enactment of the EU internal natural gas legislation – more precisely, the Third Energy Package – the internal market appears to be working relatively well. For example, the non-discriminatory third-party access regulation has turned out to be successful in the energy field.<sup>4</sup> Regardless of these regulatory measures, the issues of third country company access and third countries' position in the EU natural gas arena have proven challenging. Various legal disputes, as well as differences of opinion over economic and political issues, have arisen between the EU or EU Member States and third countries.<sup>5</sup> Although this paper does not cover the parties' political positions thoroughly, we will see that political issues have had an impact on the development of EU legislation on the energy sector. The parties' legal and political actions, on the other hand, are examined more thoroughly. These primarily comprise the norms regulating third country company access to the EU internal gas market, as set out in the Gas Market Directive.

## 1.2 Research question

The research question concerns the issue of equal treatment for actors providing natural gas to the EU. Access to the market should, in principle, be granted to all market players on the same conditions without discrimination based on such issues as geopolitics. However, the legislative framework for natural gas has certain discriminatory elements embedded into it.<sup>6</sup> Furthermore, the European Commission's current proposal to modify certain aspects of the existing legislative framework appears to be discriminatory. This paper assesses certain general aspects of EU energy law, followed by a study of the internal natural gas market and its legal basis. After this section, the paper discusses EU law-making procedure on a general level with a view to clarifying the complex procedural steps involved in the creation of EU law in this area and

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<sup>4</sup> See, e.g., Alex Barnes, 'EU Gas Market is competitive', [2017] *World Energy Council*.

<sup>5</sup> Many of the exporting countries have a very different approach to natural gas markets. In summary, while the EU relies on a competitive model, Russia and other gas-producing countries utilise a more state-driven model where exporting companies are closely connected with the state and have exclusive rights to export natural gas.

<sup>6</sup> E.g. Article 11 of the Gas Market Directive: the 'Gazprom Clause'. Furthermore, some of the discriminatory elements were the subject of the recent WTO dispute: Panel Report, *European Union and its Member States — Certain Measures Relating to the Energy Sector (EU – Energy Package)*, WR/DS476/R, circulated to Members on 10 August 2018.



the political background to it. This is followed by an assessment of third country company access to the European market, which covers why the proposed amendment is sub-optimal for the European gas market. This assessment is illustrated by reference to the Nord Stream 2 project, to which the EU gas legislation amendment closely relates. Additionally, the Gazprom clause is assessed to support the research.

The research questions examined in this paper concern (1) how politics impacts on the development of third country companies' access to the EU internal gas market, and (2) whether the access rules can be interpreted as discriminating against third country companies. In assessing these issues, use is made of legal articles and general EU energy law literature, as discussed under chapter 1.3.

### 1.3 Research method and sources

While the focus is on the EU's natural gas legislation, the politics behind the Nord Stream 2 project are also examined, as is the certification of third country companies for the EU gas market, with a view to assessing how these issues foster legislative change in the EU. Therefore, the method used entails a legal and political assessment of the market situation and how it impacts on the EU legislative process. Legal dogmatics features, mainly in the form of an examination of certain norms laid down in the Gas Market Directive and how these impact on third country companies' market access by, for example, changing the wording and functions of certain legislative texts. In legal research, legal dogmatics are viewed as being multi-level in nature. At the first general level, all legal material is examined through scientific processing. At a deeper level, legal dogmatics are examined in a more specific manner that enables assessment of law governing specific areas.<sup>7</sup> This paper largely focuses on the second level, where the application of sector-specific legal texts is examined from a legal policy viewpoint. The legal policy aspect emerges through examination of law-making procedures within this field and of the significant role played by politics in shaping EU law. This examination utilises legal theory as a research method that provides a broader picture of the relationship between law and politics and the placing of the issues examined in this relationship. The legal policy

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<sup>7</sup> Raul Narits, 'Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts', [2007] *Juridica International*, p. 19.

aspect of this research entails the examination of political documents and certain underlying objectives that impact on legislative measures at EU level.<sup>8</sup>

As the research focuses on the interaction between law and politics in the EU energy field, the above-mentioned research question is answered by examining legislative work, legal literature and market-based statistical material (etc.). The literature survey principally focuses on legal articles and basic EU energy law literature and is set out below.

The literature used in the examination mainly comprises legal textbooks and articles about the topic in question. The background to the topic addressed in this paper and the much-discussed Nord Stream 2 project is covered by means of a short comparison of the politics behind the project via a review of the relevant literature as well as literature covering the basic aspects of EU energy law. This review entails, in particular, a comparison between the work of two authors that have been active, respectively, in supporting and opposing the project. Alex Barnes, Government Relations Advisor at Nord Stream 2 AG, supports the project on the basis of market-based information. Alan Riley, senior fellow at the Atlantic Council Global Energy Center, strongly opposes the project on the basis of previous relations between the EU and Russia, mostly in the energy sector.

Before addressing the political debate over the Nord Stream 2 project, the literature review referred to above covers the literature on EU energy law and politics by means of reviewing a basic research handbook on EU energy law and policy.<sup>9</sup> This research handbook examines multiple aspects of EU energy law and policy, including the economic and governance background to the field. Furthermore, it provides a clear picture of the market and certain issues affecting it, as well as discussing the EU's role in comparison with that of other actors on the energy market, such as Member States, and external policy in the area, covering third countries. The legislation relevant to the topic of this paper is examined by reference to different aspects, such as the dimensions mentioned in the research handbook: energy security; an integrated European energy market; energy efficiency; decarbonisation; and research, innovation and

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<sup>8</sup> The difference between legal policy and law is that legal policy is seen as constituting principles that underpin the law; while law should support the public interest by being fair and judicious.

<sup>9</sup> Rafael Leal-Arcas and Jan Wouters (eds.), *Research Handbook on EU Energy Law and Policy* (Edward Elgar Publishing Limited 2017).

competitiveness. In addition to the EU aspect, the book covers certain international instruments governing the field, such as the Energy Charter Treaty (ECT), and discusses their impact on the EU energy field. Legal and policy-based textbooks, including the one mentioned above, are referenced in the paper in order to provide the reader with a deeper understanding of the issues discussed and their underlying legal and political bases.

The opposing views of the Nord Stream 2 project presented by Barnes and Riley rests on their respective backgrounds. Analysis of the political arguments made in opposition of the project and the way in which these are presented reveals that this opposition is, on the whole, poorly justified. The articles written by these authors,<sup>10</sup> which are examined here, vary largely in relation to their treatment of the legal and political arena, as discussed below.

The basic differences between the articles relate to the way certain arguments are put forward. Barnes uses market-based research, such as statistics and reports prepared by different institutions, that concerns the need for natural gas in the EU and, more broadly, its role in the EU energy mix. Riley's arguments are based strongly on his views gained through experience and based on the history of EU politics, especially the relations between EU and Russia. Riley problematises the issue and identifies threats that relate to the Nord Stream 2 project, in order to give an unfavourable picture of the project. This gives the impression that Riley's main purpose is to lobby against the project without basing his arguments on market facts.

#### 1.4 The relationship between law and politics

This chapter contains a brief review of relationship between law and politics from a theoretical standpoint. The assessment focuses on the relevant aspects covered in this research paper. This includes analysis of what is understood as the politics of the legal field and how they, from a theoretical standpoint, impact on and interact with law. The main focus of the research is on

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<sup>10</sup> The review examines the following articles:

- (1) Barnes, 'Nord Stream 2, Friend or enemy of energy security in Europe?', Policy Insights: Thinking ahead for Europe 2017.
- (2) Barnes, 'A bigger role for gas in the EU energy mix?', *Energy World* 2017.
- (3) Riley, 'Nord Stream 2: Understanding the Potential Consequences', Atlantic Council: Global Energy Center 2018.
- (4) Riley, 'A Pipeline Too Far? EU Law Obstacles to Nordstream 2', Atlantic Council: Global Energy Center 2018.

how politics, from a practical perspective, have impacted on EU natural gas legislation and continue to do so. Accordingly, this chapter provides a deeper understanding of the question at hand and how it can be connected to a resolution, i.e. the answer to the research question.

Law in its present form has strong connections with other fields. This is, and must be, the starting point for any legal analysis. Why? Because, without these connections, law does not exist. Law consists mainly of legislative texts, which regulate these non-legal fields. These include energy, the environment, obligations between parties and numerous other fields. While this basic premise is easy to understand and relate to, the relationship between law and politics can be understood as more complex.

Law can be examined through political ‘branches’, such as decision-making in a democratic system, or from a broader sociological perspective. This chapter focuses on the sociological approach; while the legal policy approach is the basis both of the main analysis carried out in this paper and of the answer given to the research question, and is multidisciplinary in nature.<sup>11</sup> The importance of law, i.e. rules, in a political society, is apparent when looking at the history of mankind. Rules have been present from the beginning of the societal era to regulate certain interests of the people.<sup>12</sup> Consequently, developing the evolving relationship between politics and law may be viewed as a clear goal of modern society. In this context, the democratic system is a result of the development of modern societies over time. However, it is important to note that law and politics have travelled hand in hand in terms of their development and each has influenced the other.<sup>13</sup>

The main area where politics impacts on law is the generation of legislative texts, which is seen as the main task of politics.<sup>14</sup> As the task of law-making is examined closely in this paper, the analysis begins by separating the relationship into three elements, based on Cerar’s division.<sup>15</sup> These are *goals*, *means* and *obstacles*. The purpose of this division is to facilitate study of the

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<sup>11</sup> Kaius ’Ervasti, ‘Oikeussosiologia ja oikeuspoliittinen tutkimus osana oikeustiedettä’ [2011] *Oikeustiede-Jurisprudentia XLIV*, Suomalainen lakimiesyhdistys, p. 86.

<sup>12</sup> Guy Cutlip, ‘The History of Law’ [1925] 59(3) *American Law Review*, p. 361.

<sup>13</sup> Brian Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, [2008] St. John’s School of Law, p. 13.

<sup>14</sup> Alexander Larry, ‘Law and Politics: What Is Their Relation?’, [2018] 41(1) *Harvard Journal of Law & Public Policy*, p. 355.

<sup>15</sup> Miro Cerar, ‘The Relationship Between Law and Politics’, [2009] 15(1) *Annual Survey of International & Comparative Law*, p. 19.

relationship between law and politics and its impact on the EU's legislative tasks, as well as the influence exerted by the parties affected by the legislation. In addition to Cerar's view on three sections of the relationship, I present my perspective as to how these can be understood when dealing with the research question of this paper.

#### 1.4.1 Goal aspect

The goal-directed view of the relationship between law and politics appears when politics identifies a certain legal value as a goal.<sup>16</sup> Various goals can be discerned in this context. In this paper, the goal is directed towards the law-making area. Political goals in relation to the law include values such as democracy within the legislative procedure and justice towards states and parties to which the legislation is addressed. These values may concretise when law provides the prerequisites for this to occur. Within the EU, there is a large amount of legislation concerning democracy within the law-making procedure in the context of the separation of powers. As discussed in chapter 2 of this paper, the institutions empowered to adopt EU law represent different parties, i.e. those towards which the legislation is principally addressed. The principle of parity finds expression in the distinct powers of the institutions, which has the aim of safeguarding governance from abuse by administrators.<sup>17</sup> The EU Commission represents the EU's goals, the European Parliament (EP) represents the people of the EU through elections, and the Council of the European Union (hereinafter the 'Council') represents Member State governments.<sup>18</sup> This separation of powers enhances democratic fairness in the adoption of EU law. The ordinary legislative procedure, under which these three institutions must agree on a legislative proposal for it to become binding legislation, is regulated under Article 294 TFEU. Accordingly, politics provides the goals in this area, while EU law provides the tools to achieve those goals. The ultimate goal of politics, law and the relationship between them is efficient realisation of their aims.

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<sup>16</sup> Cerar 2009, p. 19.

<sup>17</sup> Morris Cohen and Felix Cohen, 'Readings in Jurisprudence and Legal Philosophy', [1951] *Law and Politics*, p. 861.

<sup>18</sup> Handbook on the Ordinary Legislative Procedure (European Parliament 2017), available at <http://www.epgencms.europarl.europa.eu/cmsdata/upload/10fc26a9-7f3e-4d8a-a46d-51bdadc9661c/handbook-olp-en.pdf> (last accessed on 24 June 2019), p. 1.

#### 1.4.2 Means aspect

The means aspect of the legal and political connection finds expression in the fact that law is viewed from a political standpoint as a tool by which to fulfil political aims.<sup>19</sup> While this does not equate to a direct relationship between law and politics, law is a necessary medium for the realisation of political goals. However, law does not in itself provide the means by which political goals can be realised but provides a framework in which this may take place. The same is true vice versa.<sup>20</sup>

In the EU legislative process, as discussed above, the means aspect appears in the political goal aspect by the fact that legislation forms the framework for politics, as the space in which political goals can be actualised to the extent allowed by law. Similarly, politics provides a framework for law by guiding the way in which it can work towards certain legislation and indicating the parameters of political adequacy. The reason for this is that this framework gives law its substance.<sup>21</sup>

#### 1.4.3 Obstacle aspect

The obstacle aspect can be seen as the black sheep within the relationship between politics and law. While politics strives to fulfil its task, law may appear as an obstacle to be overcome.<sup>22</sup> This arises in situations where law does not offer appropriate tools by which to achieve political goals, which is, in the end, against the interests of the parties that the legislation concerns. Unfair treatment, i.e. discrimination, for certain parties can be understood as an obstacle, where the aims of the 'winning' parties can be seen as doubtful against the party being treated unfairly. This is closely linked to the problems of giving effect to democracy. Accordingly, political and legal aims need to be as finely balanced as possible in order to achieve both. Law and politics can succeed in situations where the political aims can overcome the legal obstacle.

In the EU law-making process, this means that legal goals must not impede political goals in situations where the legislature does not have a specific reason to refuse to give effect to the

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<sup>19</sup> Cerar 2009, p. 19.

<sup>20</sup> *ibid.*, pp. 22-23.

<sup>21</sup> *ibid.*, p. 23.

<sup>22</sup> *ibid.*, p. 19.

political goal at hand. In practice this means that law should not run counter to political fact, and that no attempts should be made by political means to alter well-functioning legislation.

## **2 INSTITUTIONAL FRAMEWORK FOR ENERGY MARKET REGULATION**

### **2.1 Background**

The tasks of the EU institutions cover a wide spectrum, ranging from law-making to decision-making, and they also coordinate different national and international bodies. A complex network of players is to be found in the legislative arena. The drafting and adoption of EU law entails complex interaction between the EU institutions, i.e. the Commission, the EP and the Council. Under the ordinary legislative procedure, these institutions work towards agreement on legislative texts. When the Commission proposes a legislative act, which is prepared by a sector-specific department, further bodies also play a role. In the energy sector, which this paper covers, parties such as the EU Agency for the Cooperation of Energy Regulators (ACER) as well as national parliaments and regulatory authorities have a role in the legislative process. While the legislative procedure follows a path that is regulated under EU law, interest representation at EU level also has an impact on the formation of the law. Lobbying is an activity in which lobbyists seek to protect or push forward their interests and those of the interest groups they represent. However, lobbying plays an important role as lobbying activities allow EU institutions to receive technical information relating to planned legislation. Therefore, the process of interest representation helps legislators as well as increasing the legitimacy of EU law-making.<sup>23</sup>

This section examines the institutional framework laid down by the EU in relation to legislative procedure. The institutions discussed are limited to those that are relevant actors in the sphere of EU energy law. Therefore, the focus is mainly on the EP, the Council and the Commission as these are the institutions directly involved in the legislative process. The Court of Justice of the European Union (CJEU) and the European Council are briefly discussed. Some EU energy-

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<sup>23</sup> Emilia Korkea-Aho, “‘Mr Smith Goes To Brussels’: Third Country Lobbying and the Making of EU Law and Policy”, *Cambridge Yearbook of European Legal Studies*, Vol 18, December 2016, p. 45.

specific bodies are covered in order to provide insight as to the sector-specific players involved in legislating in relation to EU energy markets. Interest representation in relation to the three main institutions – the EP, the Council and the Commission – is briefly discussed. This includes examination of how lobbying takes place within the institutions and what kind of a role this has in the legislative procedure. Furthermore, an assessment of how the institutions work together and the nature of their specific roles in relation to each other is carried out. This covers the roles of EU institutions, energy-specific bodies and national parliaments and regulatory authorities.

The scope of the assessment outlined above is limited to the position and tasks of the relevant institutions and how they are politically lobbied, i.e. how interest representation affects the institutions in relation to their legislative tasks. The scope of the examination is limited to the main tasks involved in the institutions' law-making process. Furthermore, it covers the specific aspects that are relevant to the adoption of EU legislation on energy, while focusing on the ordinary legislative procedure, which is the most frequently used method of adopting EU legislation. This section does not, therefore, provide a thorough examination of the institutions in the legal field as it focuses on the procedures currently in place in relation to the adoption of EU law and the political influences behind them. Furthermore, due to limited space, no attention is given to interinstitutional negotiations in relation to the legislative process.

The examination under this section is carried out to give a picture of the openness of EU law-making and its political background, which is assessed by reference to case-law in more detail below. Thus, with a view to providing insight into the third country actors involved in the EU energy field as well as in the legal arena of the EU more broadly, stakeholder actions are assessed here.

## 2.2 EU institutions

The EU institutional framework is regulated under Article 13(1) in the Treaty on European Union (TEU)<sup>24</sup> and comprises the EP, the European Council, the Council, the Commission, the CJEU, as well as the European Central Bank and the Court of Auditors. This paper focuses on these institutions, excluding the last named two.

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<sup>24</sup> Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, p. 13).



Article 13(2) TEU stipulates that each institution shall act within the limits of the powers conferred on them in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions must also practise mutual sincere cooperation, which is important to note in the context of this paper. Article 13 TEU covers the general framework of the EU institutions. The governing provisions of the institutions are to be found in the TFEU, part VI of which covers the above-mentioned institutions. For example, the provisions relating to the CJEU are to be found in Articles 251 to 281.<sup>25</sup>

The following chapters examine the separate EU institutions from an EU Treaty perspective. Each chapter generally covers the tasks and jurisdiction of each institution in the legislative field. This is followed by a brief discussion of the political aspects of the relevant processes, i.e. their effect on the institutions and their work. Although this research focuses on the EU institutions, other energy-specific bodies that are politically relevant in relation to the EU energy law-making process are also discussed.

### 2.2.1 The EP

While the EP's Rules of Procedure<sup>26</sup> regulates its functioning, including its internal setup and decision-making, Article 14(1) TEU provides that the EP exercises legislative functions as well as political control and consultation. The legislative functions concern EU legislation such as regulations and directives.<sup>27</sup> Although the EP has a key role in respect of EU legislative decision-making,<sup>28</sup> including in relation to the energy sector,<sup>29</sup> it is not, as discussed below, the

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<sup>25</sup> Francis G. Jacobs, 'The Lisbon Treaty and the Court of Justice', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon* (Oxford University Press 2012), p. 197.

<sup>26</sup> European Parliament Rules of Procedure, 2014-2019, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20180731+0+DOC+PDF+V0//EN&language=EN> (last accessed on 20 June 2019).

<sup>27</sup> Bruno de Witte, 'The Decision-Making Process', in D. Patterson and A. Södersten (eds.), *A Companion to European Law and International Law* (John Wiley & Sons, Inc. 2016), p. 99.

<sup>28</sup> Nils Ringe, *Who Decides, and How?: Preferences, Uncertainty, and Policy Choice in the European Parliament* (Oxford University Press 2009), p. 1.

<sup>29</sup> See, e.g., <http://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/legislative-powers> (last accessed on 18 June 2019).

sole actor in the legislative process.<sup>30</sup> This chapter covers the EP's legislative powers and does not, therefore, address its other tasks as these are of no relevance to this research.<sup>31</sup>

The ordinary legislative procedure<sup>32</sup> is the normal procedure used for the adoption of EU legislation. In the EP, this procedure starts with legislative proposals being given to a parliamentary committee.<sup>33</sup> The committee responsible for the energy sector is the Committee on Industry, Research and Energy, the tasks of which cover, for example, EU measures in relation to energy policy and the functioning of the internal energy market.<sup>34</sup> The proposals given to the committees are allocated to a political group. The political group's rapporteur, chosen by the group, composes a report on behalf of the committee. Other political groups may also submit reports to coordinate their views on the proposal at hand.<sup>35</sup> It is important to note that under shared competence, Member State parliaments receive the proposals at the same time as the EP and Council.<sup>36</sup>

When a proposal is submitted to the EP, the work begins with the first reading. Article 294 TFEU lays down the steps of the procedure, which are briefly introduced here. At the first reading, the EP may adopt amendments to the proposal or approve it without further amendment. After this stage, the proposal goes to the Council's first reading. If the Council agrees with the EP's position and has no further amendments to propose, the act is adopted. If the Council adopts amendments to the proposal, a second reading follows. At this stage, the act is adopted if the EP approves the Council's position. If the EP rejects the Council's amendments, the act is not adopted. Furthermore, if the EP seeks to amend the Council's amendments, the Council may approve the new amendments, after which the act is adopted. If the Council declines to do so at the second reading, the procedure goes to a third reading. Before the third reading, a conciliation stage takes place, during which negotiations take place between the institutions with a view to reaching agreement on the amended legislative text. Then, at the

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<sup>30</sup> de Witte 2016, p. 98.

<sup>31</sup> These other powers include, e.g., budgetary and supervisory powers. For further details, see <http://www.europarl.europa.eu/about-parliament/en/powers-and-procedures> (last accessed on 20 June 2019)..

<sup>32</sup> The ordinary legislative procedure between the Parliament and the Council is laid down in Article 294 TFEU. This paper does not cover the special legislative procedure laid down in Article 289(2) TFEU.

<sup>33</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 3.

<sup>34</sup> Annex V of Parliament's Rules of Procedure 2014, part IX.

<sup>35</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 3.

<sup>36</sup> See [https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments\\_en](https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments_en) (last accessed on 18 June 2019).

third reading, the parties may either agree on the outcome of the meeting of the Conciliation Committee, leading to the act being adopted, or fail to reach agreement on the joint text, leading to the act not being adopted.

The ordinary legislative procedure briefly described above shows the interaction between the Parliament and the Council in the legislative phase, as well as the Commission's role. Although the procedure is explained in brief here, the different stages are politically more complex than the discussion above would tend to indicate and, in particular, political influence is exerted at various different stages.

In addition to the EP's legislative procedure, its powers as a litigant before the CJEU form an important part of its role within the EU. In this regard, its intervention rights and standing in relation to annulment actions are relevant to the topic of this paper. Without going too deeply into this matter, it is worth noting that this is politically an important aspect, as the EP has the right to intervene in court proceedings and thereby support one of the litigants.<sup>37</sup> The EP's standing in respect of legislative annulment actions is multifaceted in nature. It can be a defendant (*legitimation passive*) and an applicant (*legitimation active*) in the process.<sup>38</sup> Next, some political aspects of the topics covered in this chapter are assessed.

As is clear from the institutional division of legislative power, no institution has the power to enact legal norms without the agreement of the other institutions. The principle of parity in this context enhances the fair use of legislative power. In the legislative process, the EP is understood as representing the people through elections and the Council as representing Member State governments.<sup>39</sup> This split may be regarded as deriving from the aim of dividing powers between different actors. In addition to the EP and the Council, the Commission plays a part in the process by making the legislative proposal. From a democratic point of view, the separation of legislative powers between the institutions and the representation of different parties strives to meet the need for democracy, which is defined in academia as meaning open and fair elections.<sup>40</sup> This is the case in the EP, where Members of the European Parliament

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<sup>37</sup> Ágoston Csanád Mohay, 'The European Parliament as a litigant before the European Court of Justice' [2006] 5, p. 313.

<sup>38</sup> *ibid.*, pp. 315-317.

<sup>39</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 1.

<sup>40</sup> Stephen Vitkovitch, 'Assessing the European Parliament's Democratic Credentials', [2015] 15(4) *Romanian Journal of European Affairs*, p. 7.

(MEPs) are chosen in elections in which citizens of the Member States have the right to vote (Article 20(2) TFEU).

In the legislative process, there is a legal as well as political need for appropriate solutions regarding the legislative text. In addition to up to three readings taking place in the EP, which enhances the political and legal correctness of the final act, the sector-specific committees in the legislative process also contribute to, or at least should, appropriate solutions being achieved. In respect of sector-specific questions, the committees support the knowledge needed in respect of these issues.

Influencing the EP's work, especially in relation to its legislative powers, is done via different methods of interest representation, i.e. lobbying. The lobbyists are political interest groups that are usually present in all stages of the relevant legislative processes.<sup>41</sup> The way in which the battle for influence is conducted on a business level has undergone change. The main factor in this is that the Lisbon Treaty greatly increased the EP's legislative powers.<sup>42</sup> Prior to this, the EP was regarded as a sideshow for lobbying compared to lobbying the Commission.<sup>43</sup> Nowadays lobbying happens at all stages, regardless of how successfully one particular institution has been influenced through lobbying.<sup>44</sup> It is seen as a way of ensuring that the lobbyist's input and interests are secured or as another opportunity to influence the outcome of a particular process. What differentiates lobbying the EP from lobbying other institutions is that the EP is more complex in the way that it operates, since it has several veto points and offers various opportunities for horse trading. Accordingly, effective lobbying calls for extensive networking and coalition-building, as well as approaches of a non-technical type.<sup>45</sup> Due to these facts, lobbying is a more complex and wide-ranging activity than used to be the case and it exerts a strong influence on decisions made in the EP.

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<sup>41</sup> David Coen and Jeremy Richardson, *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009), p. 3.

<sup>42</sup> Maja Kluger Rasmussen, 'The Battle for Influence: The Politics of Business lobbying in the European Parliament' [2015] 53(2) *Journal of Common Market Studies*, p. 365.

<sup>43</sup> Wilhelm Lehmann, 'The European Parliament', in Jeremy Richardson and David Coen (eds.), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009), p. 39.

<sup>44</sup> David Marshall, 'Who to lobby and when: Institutional determinants of interest group strategies in European Parliament committees', [2010] 11(4) *European Union Politics*, p. 559.

<sup>45</sup> Lehmann 2009, p. 40.

The goal of lobbying at the EP is to influence its position on certain questions. As mentioned above, lobbying may be carried out to change the EP's position or to ensure that an interest group has input into the issue at hand. On a practical level, lobbying takes place at all stages of a legislative procedure. The rapporteurs are lobbied within the committee process, while committee members are lobbied at the draft report, open amendment and compromise phases.<sup>46</sup> Most of the lobbying at the EP takes place at the committee meetings before the plenary session. This is because the EP's position is usually decided at the primary stage.<sup>47</sup>

Business lobbying at the EP stage is regarded as more useful than lobbying at the other institutions because of its transparency and openness to influencers. Meanwhile lobbying at the Commission is mostly done by national associations.<sup>48</sup> While different types of influencers are involved, it is important to note that lobbying takes place, in business terms, through company representation, national business associations and European business federations.<sup>49</sup> Therefore, different forms of lobbying take place, from several sources and concentrate on different actors (also among the MEPs<sup>50</sup>). The short description of the methods of lobbying the EP set out above shows that it is a complex arena, as influencing is present at all stages and in a variety of forms. To provide a clearer picture of lobbying at EU level, the paper covers lobbying activities at the Commission as well as the Council in the chapters below.

### 2.2.2 The Council

The Council's position<sup>51</sup> is somewhat similar to that of the EP in relation to this sector. Its main purpose is to represent Member State governments.<sup>52</sup> Its role in relation to law-making is explained below. The Council's other tasks, such as coordinating the policies of EU Member States and adopting the EU budget, are not covered in this paper.

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<sup>46</sup> Marshall 2010, p. 562. See also for further information regarding lobbying tactics.

<sup>47</sup> *ibid.*, p. 555.

<sup>48</sup> Rasmussen 2015, p. 366.

<sup>49</sup> *ibid.*, p. 368.

<sup>50</sup> *ibid.*, p. 370. Note the differences in approach in relation to influencing MEPs who are powerful in different ways.

<sup>51</sup> The Council of the European Union should not be confused with the European Council (see tasks of the European Council under Article 18 TEU).

<sup>52</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 4.

The legal basis of the Council is laid down in Article 16 TEU and Articles 237 to 243 TFEU. The Council's main role entails focus on the legislative process. Article 16(1) provides that the Council must, jointly with the EP, exercise legislative functions among other things. As discussed in chapter 2.2.1, this means in practice that when the Commission proposes a legislative text, it must, together with the EP, agree on the proposal and possible amendments made by the Council or the EP.<sup>53</sup> The Council maintains a three-tier structure in relation to legislative work. These are the working parties, the Committee of Permanent Representatives of the Governments of the Member States (Coreper) as well as the Council. Basically, the working parties prepare the work of Coreper, which in turn prepares the work of the Council. The Presidency of the Council hosts the meetings on these levels.<sup>54</sup> The role of Coreper is covered below.

When the proposal reaches the Council, it passes through the above-mentioned levels. When the EP has indicated its position on the proposal (first reading), the Council position can be adopted.<sup>55</sup> Therefore, the EP indicates its position before the Council does so. As explained above, both first and second readings, possibly followed by a third reading if required due to a qualified majority of the EP's amendments not being achieved within the Council, take place within the Council and the EP. After the EP's second reading, the Council has a three-month period to finalise its second reading.<sup>56</sup> Finally, the conciliation and third reading takes place, if needed as mentioned above.

Article 16(7) TEU provides that Coreper's main task is to prepare the work of the Council. It is the Council's main preparatory body, chaired by the deputy permanent representative of the state holding the presidency of the General Affairs Council.<sup>57</sup> Coreper is divided into two configurations: Coreper I and Coreper II. Both configurations meet weekly, setting the agenda of the Council. While Coreper I is composed of each country's deputy permanent representatives, Coreper II is composed of the Member States' permanent representatives.<sup>58</sup> Therefore, the representatives represent the interest of their governments. The responsibilities

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<sup>53</sup> Richard Corbett, 'The Evolving Roles of the European Parliament and of National Parliaments', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon* (Oxford University Press 2012), p. 249.

<sup>54</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 4.

<sup>55</sup> *ibid.*, p. 20.

<sup>56</sup> *ibid.*, p. 24.

<sup>57</sup> <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/coreper-i/> (last accessed on 19 June 2019).

<sup>58</sup> *ibid.*

of the formations are divided by sector. Coreper I is responsible for energy topics, among other things.<sup>59</sup> The Committee can be understood as giving the Council a helping hand, although it has the power to work out agreements and compromises under Article 240(1) TFEU. These must ultimately be agreed upon by the Council in order for them to take effect.<sup>60</sup> Generally speaking, the task of Coreper is to prepare the Council's work, which also occurs in the context of the legislative procedure and is discussed above.

The political basis of the legislative process and its institutional representation are discussed above. The EP is seen as representing the people of the EU (through direct elections of MEPs), and the Council as representing Member State governments. What differentiates the Council from the EP in relation to political lobbying is examined below.

First, it is worth noting that the Council's work goes through three levels, i.e. the working parties, Coreper and finally the Council. The existence of these levels also offers lobbyists the possibility to exert an influence at different stages of the legislative procedure. Furthermore, Council meetings are divided into nine configurations by sector.<sup>61</sup> This gives some idea of the divided nature of the Council as a lobbying target. Another aspect that differentiates lobbying the Council from lobbying the EP or the Commission is that it is regarded as not being as transparent as the other institutions. This understanding is based on the fact that for decades the Council has sought to keep its work confidential and its documents unavailable.<sup>62</sup> Furthermore, most of the Council's staff are employed on short-term contracts, which is not the case for EP and Commission staff. This makes lobbying more difficult. At the Council, ministers work indirectly as representatives of their Member State's citizens. Since the ministers' task is to represent their peoples' interests, such interests may be regarded as national in character.<sup>63</sup> In theory, this should make the lobbyist's task yet more challenging.

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<sup>59</sup> David Bostock, 'Coreper Revisited', [2002] 40(2) *Journal of Common Market Studies*, p. 216.

<sup>60</sup> See <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/coreper-ii/> (last accessed on 24 June 2019).

<sup>61</sup> Fiona Hayes-Renshaw, 'Least Accessible but not Inaccessible: Lobbying the Council and the European Council', in David Coen and Jeremy Richardson (eds.), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009), p. 74.

<sup>62</sup> *ibid.*, p. 73.

<sup>63</sup> *ibid.*, p. 77.

It may be seen that the division of legislative powers between the institutions has drawn attention away from the Council.<sup>64</sup> It may also be assumed that the Lisbon Treaty has increased this effect by giving the EP greater legislative power. The explanation behind this is simple: it is easier to lobby elsewhere. However, the Council still plays an influential role.

### 2.2.3 The Commission

Article 17 TEU lays down the legal basis of the Commission. The institution has a wide range of power and tasks. Article 17(1) gives the Commission the task of promoting the EU's general interests and take the initiative for that purpose. In addition,

‘[i]t shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. Apart from the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation.’

Article 17(2) governs the Commission's role in the legislative arena. As a rule, EU legislation is adopted on the basis of a proposal from the Commission.<sup>65</sup> Therefore, formal commencement of the legislative process is its main role, as examined in detail below.

The role of preparing legislative proposals at the Commission entails several tasks. First, the Commission performs thorough consultations with stakeholders and the public, and acknowledges expert reports as well as impact assessments in respect of the proposal.<sup>66</sup> It can also adopt green and white papers to examine the position of institutions and stakeholders further.<sup>67</sup> A proposal is then adopted by the College of Commissioners, which comprises a President and 27 Commissioners (one from each Member State). This can be done either in a written procedure without discussion or in an oral procedure.<sup>68</sup> After the final procedures at the

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<sup>64</sup> Pieter Bouwen and Margaret McCown, ‘Lobbying versus litigation: political and legal strategies of interest representation in the European Union’, [2007] 14(3) *Journal of European Public Policy*, p. 424.

<sup>65</sup> Article 17(2) TEU lays down an exception to the Commission's monopoly on legislative proposals (i.e. acts may be adopted on other bases where the Treaties provide otherwise).

<sup>66</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 6.

<sup>67</sup> de Witte 2016, p. 101.

<sup>68</sup> Handbook on the Ordinary Legislative Procedure 2017, pp. 5-6.



Commission, the EP and the Council receive the proposal and initiate the procedures outlined above.

In addition to the composition of the Commission explained above, around 32,000<sup>69</sup> people work for the institution under the framework set out in the institution's work programme.<sup>70</sup> Due to the various tasks carried out by the Commission, working to achieve its goals can be a complex matter. The complexity of the institution gives lobbyists several means by which to contribute their input, as discussed below.

The representation of interests at the Commission is subject to internal and hierarchical division in a similar manner to the Council.<sup>71</sup> This impacts on the way in which political influencing is carried out in various ways. The institution works on many levels, which involve separate specialised sectors. For example, the Commission is divided into Directorates-General, each of which is dedicated to a specific field of expertise and has contact with the other institutions that have input into legislation. Similarly, on a hierarchical level, policy proposals are conveyed through various levels at the Commission.<sup>72</sup> Identifying the correct point of contact to approach may be one of the most challenging tasks faced by lobbyists, along with the general difficulties involved in representing interests effectively in such a complex institution as the Commission. The brief explanation of the Commission's functions and hierarchies set out below offers an insight into the complicated arena of lobbying at the institution.

The Commission, which has the role of proposing legislation, depends on various political and technical information from external resources in its work.<sup>73</sup> Although the EP has now acquired additional powers in the legislative field, the fact that the Commission is responsible for the first round of legislative drafting makes it the primary target for lobbying activities in respect of the EU legislative procedure, particularly in its early stages. Bouwen has referred to the

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<sup>69</sup> See [https://europa.eu/european-union/about-eu/figures/administration\\_en#staff](https://europa.eu/european-union/about-eu/figures/administration_en#staff) (last accessed on 19 June 2019).

<sup>70</sup> See, e.g., the annual work programme of the Commission: Governance in the European Union, 11 October 2017.

<sup>71</sup> Neill Nugent, *The European Commission* (Palgrave 2001), p. 135.

<sup>72</sup> Pieter Bouwen, 'The European Commission', in Jeremy Richardson and David Coen (eds.), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009), pp. 23-25.

<sup>73</sup> Nikos Vogiatzis, 'The linguistic policy of the EU institutions and political participation post-Lisbon', [2016] 41(2) *European Law Review*, p. 190.

strategy of ‘early lobbying’, which has become the dominant strategy in Brussels.<sup>74</sup> This is regarded as framing the debate at later stages.<sup>75</sup>

Although lobbying may generally be understood as securing the interests of a single party (the lobbyist), this is not the case, especially in the Commission. The Commission needs such contacts in its daily work to gain the input needed.<sup>76</sup> That covers, for example, access to expert knowledge and legitimacy.<sup>77</sup> Accordingly, interest representation supports both parties’ interests, and for the Commission, it may be identified as a cost-effective benefit. Because the Commission needs technical and expert information, companies enjoy access to it. Companies have the capacity to contribute to the law-making process with such specialist information, while associations generally enjoy better access to the EP.<sup>78</sup>

Although there is little regulation governing lobbying at the Commission (or at other EU institutions), there are informal rules that shape the interaction between lobbyists and institutions.<sup>79</sup> It has been argued that informal rules should be applied at the Commission due to the need to separate consultations initiated by the Commission from the formalised and mandatory decision-making process.<sup>80</sup>

Political influence is exercised in various ways at the Commission. As discussed above, the complexity of this issue means that it is not possible to cover these different ways thoroughly in this paper. Furthermore, as also mentioned above, regardless of how successful lobbying may have been at the Commission stage, the process of influencing continues in the next institutions to be involved in the issue, i.e. the EP and the Council.<sup>81</sup> At this point, the lobbyist’s aims may change, depending on whether the legislative text serves the interests they represent.

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<sup>74</sup> Bouwen 2009, p. 20.

<sup>75</sup> Marshall 2010, p. 560.

<sup>76</sup> Bouwen 2009, p. 22.

<sup>77</sup> Pieter Bouwen, ‘Corporate Lobbying in the European Union: The Logic of Access’, [2002] 9(3) *Journal of European Public Policy*, pp. 369-371.

<sup>78</sup> Bouwen and McCown 2007, p. 425.

<sup>79</sup> In addition, there is a transparency register listing the organisations that seek to influence EU law-making. See [https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/transparency-register\\_en](https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/transparency-register_en) for further details (last accessed on 19 June 2019). For further information concerning regulation of interest representation in the EU institutions, see Stijn Smismans, ‘Regulating interest group participation in the European Union: changing paradigms between transparency and representation’, [2014] 39(4) *European Law Review*, pp. 470-492.

<sup>80</sup> Bouwen 2009, pp. 27-28.

<sup>81</sup> Marshall 2010, p. 559.

Also, to secure successful lobbying, interest representation takes place at the latter stages as well.

#### 2.2.4 Other institutions

In addition to the institutions discussed above, this section offers a brief introduction to the roles of various institutions and parties that have a central role in EU energy law-making. This does not amount to a thorough examination of the parties, nor does it cover energy-specific bodies (see chapter 2.3). The institutions discussed below are the national parliaments and the European Council (not to be confused with the Council, as discussed above) and the CJEU.

The role of national parliaments in the legislative process is provided for in Article 12 TEU, which gives national parliaments the power to ‘contribute actively to the good functioning of the Union’. Points (a) to (f) of the Article specifies the roles of the parliaments. Points (a) and (b) grant the right to check that the drafted legal act complies with the principles of subsidiarity and proportionality.<sup>82</sup> Protocol No 1<sup>83</sup> on the role of national parliaments (Article 12(a) TEU) and Protocol No 2<sup>84</sup> on the principles of subsidiarity and proportionality (Article 12(b) TEU) further explain the Member States’ role. Each Member State parliament is entitled to submit a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. The EP committee must wait for the eight weeks given to the Member States to submit such a reasoned opinion to elapse before proceeding to the final vote. If one-third of the Member States’ opinions are to the effect that the act does not comply with the principle of subsidiarity, the act is given a yellow card. Alternatively, if it receives a majority of votes against, it gets an orange card. In brief, this obliges the Commission to either maintain, amend or withdraw the proposal at hand.<sup>85</sup>

Article 15(1) TEU provides that the European Council shall not exercise legislative functions, and states that its role is to provide the EU with the necessary impetus for its development and define its general political directions and priorities. This does not amount to a direct exercise of

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<sup>82</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 8.

<sup>83</sup> Protocol (No 1) on the role of national parliaments in the European Union.

<sup>84</sup> Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

<sup>85</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 8.

legislative powers, but may be regarded as having an impact on the matters in respect of which legislation under the ordinary legislative procedure is contemplated.<sup>86</sup>

Article 19 TEU provides that the CJEU comprises the European Court of Justice (ECJ), the General Court and specialised courts. Article 19(2) stipulates that the ECJ shall consist of one judge from each Member States and Advocates-General shall assist it. In the legislative area, the CJEU shall, according to Article 19(3) TEU ‘in accordance with the Treaties:

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
- (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
- (c) rule in other cases provided for in the Treaties.’

Article 263 TFEU gives the CJEU the power to review the legality of legislative acts. When challenging EU law<sup>87</sup> within two months of the publication, the forum for the proceedings is the ECJ or the General Court. The former hears actions involving the Member States and the EU institutions, while the latter hears actions by private applicants, i.e. natural and legal persons – ‘non-privileged applicants’. In addition to the tasks of the CJEU mentioned above, the Court may in certain cases, as provided for by the Treaties, request a proposal for a legislative act under Article 294(15) TFEU.<sup>88</sup> The Court plays a versatile and significant role in relation to legislative procedure, which entails challenging actions as well as interpreting and deciding the validity of the law.

### 2.3 Energy-specific bodies

Energy law issues within the EU are handled by various different actors. For example, ACER has a role in the legislative area of EU energy law. At the same time, the institutions examined above also have energy-specific branches. These are discussed individually below.

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<sup>86</sup> *ibid.*, pp. 7-8.

<sup>87</sup> Action for annulment can be brought by Member States, the Parliament, the Council, the Commission or individuals, companies or organisations. The right of private parties to bring an action against an act is provided for under Article 263(4) TFEU on the basis of the criterion of direct and individual concern.

<sup>88</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 9.

### 2.3.1 ACER

ACER was established under Regulation (EC) 713/2009, which forms part of the Third Energy Package.<sup>89</sup> Article 1(2) of the Regulation provides that the purpose of ACER is to assist regulatory authorities referred to in Article 35 of Directive 2009/72/EC,<sup>90</sup> which concerns common rules for the internal market in electricity, and Article 39 of the Gas Market Directive. Article 1(2) also provides that ACER is to assist the regulatory authorities ‘in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action’. ACER, therefore, works in cooperation with national authorities as well as EU institutions. Article 5 of Regulation (EC) 713/2009 provides that it may give, on its own initiative or by request, an opinion or recommendation to the EP, the Council or the Commission. In addition, ACER has an important role in the creation of network codes governing the internal gas market. These are not discussed further in this paper.

ACER interacts with other bodies in the energy field. These include national regulatory authorities (NRAs) and regulatory forums such as the Council of European Energy Regulators (CEER).<sup>91</sup> ACER’s main tasks are to coordinate the work of national energy regulators at EU level, as mentioned above, and to work towards the creation of a single electricity and natural gas market at EU level. Other tasks entail, for example, enhancing competition in the field and overseeing the work of European networks of transmission system operators (ENTSOs).<sup>92</sup> In summary, ACER’s role is to coordinate Member State regulatory and other bodies as well as to advise EU institutions in the EU energy field. Through its various tasks, it seeks to achieve an efficient electricity and natural gas market in the EU.

### 2.3.2 Energy bodies within the EU institutions and their roles

The EP, the Council and the Commission are discussed above. Within these institutions are energy specific working groups, which are discussed in this chapter.

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<sup>89</sup> Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1).

<sup>90</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

<sup>91</sup> David Haverbeke, Barbara Naesens and Wouter Vandorpe, ‘European Energy Markets and the New Agency for Cooperation of Energy Regulators’, [2010] 28(3) *Journal of Energy & Natural Resources Law*, p. 403.

<sup>92</sup> Regulation (EC) No 713/2009, Article 6.

In the EP, the Committee on Industry, Research and Energy (ITRE) focuses on the EU's measures relating to energy policy in general and in the context of the functioning of the internal energy market. Under Annex V, part IX, point 5 of the Rules of Procedure of the European Parliament, these comprise measures relating to the security of energy supply in the EU; the promotion of energy efficiency and energy saving and the development of new forms of energy; and the promotion of interconnection of energy networks including the development of trans-European network in energy infrastructure (TEN-E). The roles of the Committees in the European Parliament's legislative process are covered in chapter 2.2.1.

The Council meets in different configurations, in accordance with Article 236 TFEU.<sup>93</sup> In relation to the energy sector, the configuration utilised is the Transport, Telecommunications and Energy Council (TTE). The task of the ten<sup>94</sup> sector-specific configurations is to adopt the law and coordinate policies.<sup>95</sup> Therefore, the Council's sector-specific work takes place in these configurations, after it has passed the other levels, i.e. (energy) working parties and Coreper I. The configurations are chaired by the Member State holding the Council presidency, and Member State representatives attend the meeting. The energy ministers meet three or four times per year. Finland holds the Council presidency for the second half of 2019.<sup>96</sup>

Furthermore, the Commission's energy department is responsible for energy security, sustainability and competitive pricing of energy within the EU. The Directorate-General (DG) for Energy has responsibility for developing the Energy Union, as mentioned in its Strategic Plan 2016-2020,<sup>97</sup> which refers to the Energy Union Package.<sup>98</sup> DG Energy proposes, implements and revises legislative work in respect of the EU energy sector.<sup>99</sup> The process is explained under chapter 2.2.3, covering the Commission.

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<sup>93</sup> Article 16(6) TEU.

<sup>94</sup> Comments on the Council's Rules of Procedure: European Council's and Council's Rules of Procedure 2016 available at <https://www.consilium.europa.eu/media/29824/qc0415692enn.pdf> (last accessed on 20 June 2019), p. 14.

<sup>95</sup> Handbook on the Ordinary Legislative Procedure 2017, p. 4.

<sup>96</sup> See <https://tem.fi/en/finland-s-eu-presidency-at-the-meae> (last accessed on 25 June 2019).

<sup>97</sup> Strategic Plan of the Commission's DG Energy for 2016-2020, available at [https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-ener\\_may2016\\_en.pdf](https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-ener_may2016_en.pdf) (last accessed on 20 June 2019), p. 3.

<sup>98</sup> Energy Union Package COM(2015) 80 final, 25.02.2015, available at [https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF) (last accessed on 20 June 2019).

<sup>99</sup> Strategic Plan 2016-2020, p. 3.

As the above indicates, the complexity of the institutional tasks in relation to law-making as well as the politics behind the development of EU law pervades many levels. This goes beyond the scope of this section. Section 2 sought to identify the tasks of the main EU institutions, i.e. the Commission, the Parliament and the Council, in respect of legislation. In addition, certain energy-specific bodies have been examined. Clearly, this survey is not exhaustive, although the main parties and their principal tasks have been covered.

Although the main institutions work separately, in order for legislation to be adopted they must reach joint agreement on the legislative text. The structures of these institutions are diverse, which is reflected in the variety of the tasks of each department within them. Furthermore, other agencies and bodies, which often have expertise in the area in question, influence the institutions by supporting or advising them in respect of their work.

Interest representation at EU level occurs in the institutions that hold legislative powers. While the Council represents EU Member State governments and the EP represents citizens, the lobbying of these institutions often happens simultaneously. However, since they differ in operational terms as well as in composition, the way in which these institutions are lobbied also differs. The Commission represents European interests and has the task of proposing legislation at first instance, as a result of which interest representation is the primary means of exerting influence. This reflects the fact that the Commission depends on the technical information acquired from lobbying parties. Inevitably this has an effect on the law adopted, which is assessed below in more detail from a practical standpoint.

### **3            THIRD COUNTRY COMPANY ACCESS TO THE EU NATURAL GAS MARKET**

#### **3.1           General**

The EU natural gas market is a broad sector consisting of various segments. These can be divided in different ways, although a 2009 Commission decision divided the market into ‘i) the production and exploration for natural gas, ii) gas wholesale supply, iii) gas transmission (via high pressure systems), iv) gas distribution (via low pressure systems), v) gas storage, vi) gas trading, vii) gas supply to end customers and viii) the market for infrastructure operations for

gas imports.<sup>100</sup> The diverse functionality of the market, as can be seen from this division, has been more commonly divided into upstream, midstream and downstream segments.<sup>101</sup> The upstream section of the gas market consists of the production and exploration of gas while the midstream segment covers the transportation of natural gas by liquified natural gas (LNG) tankers and pipelines to transmission and distribution grids for distribution to large scale industrial customers. The infrastructure of the midstream segment of the industry is of great importance for the functioning of the internal market, as natural gas is mainly an import good in the EU.<sup>102</sup> The last part of the gas market distribution line is the downstream phase,<sup>103</sup> which covers distribution of gas to final customers through small-scale infrastructures. This paper focuses on questions relating to all of these segments, although the main research question relates to market access for third country companies, i.e. the midstream section that covers the industry's transmission systems. This section of the paper contains a brief discussion of the EU energy regulations of relevance to the research question.

### 3.2 The EU internal natural gas market

This section covers the EU internal natural gas market, which is carried out by examining the EU energy policies as set out in Article 194 TFEU. This does not constitute a practical approach to the functioning of the natural gas market in the EU, but rather a survey of the present instruments governing the market, to the extent relevant in this paper. This sheds light on issues relating to third country companies operating in the EU gas market.

The EU's natural gas legislation, which is covered in the section below, is based on Article 194 TFEU, which lays down the objectives of the EU's internal energy market and provides for a broad EU competence in the area. Article 194(1) provides that, in a spirit of solidarity between Member States, EU energy policy should achieve the following: '(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

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<sup>100</sup> Case No COMP/M.5649 – RREEF FUND/ ENDESA/UFG/ SAGGAS, paragraph 11.

<sup>101</sup> Lena Sandberg and Lyndy Davies, 'The relevant product market – Gas', in Christopher Jones (ed.), *EU Energy Law, Volume II: EU Competition Law and Energy Markets* (4th edn, Claeys & Casteels 2016), pp. 105-106.

<sup>102</sup> See, e.g., <https://ec.europa.eu/eurostat/cache/infographs/energy/bloc-2c.html> (last accessed on 20 June 2019).

<sup>103</sup> Aad Correljé, 'The European Natural Gas Market', [2016] 3(1-2) Springer International Publishing, p. 29.



(d) promote the interconnection of energy networks.<sup>104</sup> Article 194(2) TFEU provides that the EP and Council has legislative competence to fulfil these policy objectives through the ordinary legislative procedure (as discussed above). However, in the context of this paper, it is important to note that Article 194 TFEU provides that the measures taken by these institutions ‘shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)’. Consequently, this is an area of shared competence between the EU institutions and the Member States, which means that the EP and the Council must take into consideration the Member States’ authority in this area. While Article 194 states that the Union policy shall work in a spirit of solidarity with the Member States in reaching the EU energy policy goals, the Article gives the right to regulate, for example, security of supply at EU level. The exercise of this right cannot interfere with the Member States’ rights under Article 194(2), as described above. Consequently, the EU has priority in relation to the Member States’ rights as far as ensuring security of supply at EU level is concerned.

In addition to Article 194, the TFEU governs security of supply under Article 122, energy networks under Articles 170 to 172, and external energy policies under Articles 216 to 218.

### 3.3 EU natural gas legislation

As noted in the section above, EU natural gas legislation is based on the competence conferred on it in respect of the energy sector. This section accordingly covers the specific legislation in this area.

The internal EU natural gas market is regulated at various levels and the regulatory composition has developed in response to market needs and to changes in the EU’s goals in this area. The Third Energy Package, a significant legislative package that has been in force since 2009, has been a game changer in this context. The legislative instruments contained in the package

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<sup>104</sup> These policy objectives are defined in the Energy Union (2015): i) ensure the functioning of the internal energy market and the interconnection of energy networks; ii) ensure security of energy supply in the Union; iii) promote energy efficiency and energy saving; iv) promote the development of new and renewable forms of energy to better align and integrate climate change goals into the new market design; and v) promote research, innovation and competitiveness.

include the Gas Market Directive, Regulation (EC) No 715/2009<sup>105</sup> and Regulation (EC) No 713/2009. Network codes, required under Regulation 715/2009, set rules on cross-border network as well as market integration issues. These network codes were developed by the European Network of Transmission System Operator for Gas (ENTSOG)<sup>106</sup> and are important in governing the internal gas market, but are not, due to their technical nature, covered in this paper. Regulation 715/2009 aims to ensure the functioning of the internal gas market by laying down conditions for non-discriminatory access between national markets and by securing security of supply, among other things.<sup>107</sup>

In addition to these internal EU acts, other instruments govern specific market- and investment-related issues. These include both EU and international instruments such as the Energy Charter Treaty (ECT)<sup>108</sup> and the World Trade Organization (WTO) agreements.<sup>109</sup>

Regulation 713/2009 established ACER,<sup>110</sup> which is an independent body with expertise on technical issues concerning the energy market. Its tasks consist of drafting framework guidelines, overseeing the application of market rules, decision-making in respect of cross-border issues, and monitoring the functioning of the internal market.<sup>111</sup> The role of ACER thus focuses on the internal market as a whole, and especially on cross-border infrastructure, which differs from national regulators' competences.

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<sup>105</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36).

<sup>106</sup> The European Network of Transmission System Operator for Gas.

<sup>107</sup> Article 1 of Regulation 715/2009 sets out the aims of the Regulation as comprising the following:

‘(a) setting non-discriminatory rules for access conditions to natural gas transmission systems taking into account the special characteristics of national and regional markets with a view to ensuring the proper functioning of the internal market in gas;  
(b) setting non-discriminatory rules for access conditions to LNG facilities and storage facilities taking into account the special characteristics of national and regional markets; and  
(c) facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in gas and providing mechanisms to harmonise the network access rules for cross-border exchanges in gas.’

<sup>108</sup> Non-discrimination, fair and equitable treatment are of key importance. For more information, see <https://energycharter.org> (last accessed on 20 June 2019).

<sup>109</sup> The most-favoured-nation treatment (MFN) under the World Trade Organization (WTO) agreement (which lays down the principles of international trade law), is of key importance with regard to discrimination against trading partners. It is set out in the General Agreement on Tariffs and Trade (GATT) and GATS and stipulates that countries cannot discriminate between their trading partners. For more information on the MFN principle, see [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last accessed on 20 June 2019).

<sup>110</sup> The role of ACER is covered in more detail in chapter 2.3.1.

<sup>111</sup> See, e.g., [http://europa.eu/rapid/press-release\\_MEMO-11-125\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en) (last accessed on 19 June 2019).

Third country companies in the EU natural gas market have been subjected to discriminatory EU legislation.<sup>112</sup> While access to the EU gas market by third country companies is not specifically regulated under the Gas Market Directive,<sup>113</sup> the Commission's actions in this context, in terms of the amendments to the Directive that it has proposed, may be seen as discriminatory and as having the aim of blocking market access for a single project. This amendment<sup>114</sup> is covered in chapter 4.3.2. The situation in respect of access to the EU market at present is that EU energy law (for example, the Gas Market Directive) does not apply to cross-border pipelines prior to entering the EU (i.e. the EU internal energy market) and connecting to the onshore landing terminal. This is supported by international legislation, EU law and market custom. Therefore, EU energy law only applies to pipelines in territories within its internal market. Consequently, market access is relatively open, as each Member State is free to choose its energy supply by negotiating natural gas supply routes with third countries, as provided for in Article 194(2) TFEU.<sup>115</sup> However, as discussed below, Member States have the possibility to block third country companies' certification for entry into their national gas markets.

In addition to the legislative instruments in this area discussed above, it is important to note the core EU energy law principles, which are important for the EU energy field. These principles are third-party access, tariff regulation, ownership unbundling and transparency. Articles 32 and 40 of the Gas Market Directive govern third-party access to the natural gas network. This constitutes the right for market participants to access the existing natural gas networks for the distribution of natural gas. This right enhances competition on the market and eliminates the possibility of controlling the internal gas market. Tariff regulation relates to the pricing of access to the network, which ought to be reasonable so that new market accessors are able to access the market.<sup>116</sup> Ownership unbundling relates to the monopolies over market segments,

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<sup>112</sup> Article 11 of the Gas Market Directive regarding certification of third country TSOs in the EU market should be mentioned in this regard. This is covered in chapter 4.2.

<sup>113</sup> With the exception of Article 11, which governs the certification of third country TSOs.

<sup>114</sup> The European Commission's proposal for a directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning rules for the internal market in natural gas, 8 November 2017.

<sup>115</sup> The EU's right to regulate security of supply is an exception in this regard. However, this cannot interfere with the Member States' rights under Article 194(2), as discussed above.

<sup>116</sup> Adrien de Hauteclocque and Nicole Ahner, "Opt-Out" Clauses for EU Energy Islands in the Third Liberalisation Package: Striking Balances?', in Bram Delvaux, Michael Hunt and Kim Talus (eds.), *EU Energy Law and Policy Issues* (4th edn, Intersentia 2014), p. 222, concerning commodity pricing of natural gas (i.e. not the pricing of network access).

in the gas (or any other) field. Gas networks cannot be owned by production and or supply businesses,<sup>117</sup> and vice versa. In this context, third-party access plays a significant role for transmission system operators (TSOs) in terms of the ability to enter the internal market. Transparency in relation to network access is governed by the Gas Market Directive.<sup>118</sup> These core principles – some of which are covered more thoroughly below – have the aim of increasing competition on the market by, for example, terminating monopoly positions and the abuse of dominant positions.

EU energy legislation concerning the possibility for third country companies to enter the internal gas market is assessed more thoroughly by means of case studies in chapter 4. Due to this, a short assessment of the relevant regulations appears here. As noted above, there is no specific regulatory instrument under EU law that governs third country companies' access to the EU gas market. However, certain legislative norms govern the ability of third country companies to access the market. The market access conditions laid down in the Gas Market Directive appear to be directed against third country companies, as certain norms strongly complicate market access for these companies. This becomes most apparent when one examines the politics behind the norms, which is done in chapters 4 and 5.

The provisions of the Gas Market Directive that are of the greatest relevance and therefore covered most thoroughly in this paper are Article 2(17) and Article 11. Article 2(17) and the amendment recently proposed by the Commission<sup>119</sup> entail a change to the applicability of EU energy law to import gas pipelines from third countries, specifically offshore pipelines. This legislative change is viewed as having a strong impact on third countries' ability to undertake projects that bring pipelines into the EU in the future. The precise impacts of these provisions are assessed below together with the political agenda behind the changes. Article 11 of the Gas Market Directive covers certification of third country TSOs and imposes certain requirements on these companies, such as a risk assessment regarding security of supply. In this context, Member State national regulators may prohibit the certification of third country TSOs on

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<sup>117</sup> Adrien De Hauteclocque and Nicole Ahner, '“Opt-out” clauses for EU Energy islands in the Third Liberalisation', in Bram Delvaux, Michael Hunt and Kim Talus (eds.), *EU Energy Law and Policy Issues* (4th edn, Intersentia 2014), p. 12.

<sup>118</sup> See recital 8 of the Directive.

<sup>119</sup> European Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 8 November 2017, Brussels, COM(2017) 660 final.

different grounds than apply to companies based in Member States. These norms accordingly impact on third country companies' access to the EU internal energy market, which is assessed in more detail below.

### 3.4 Market access treatment

Equal treatment is of the utmost importance in a strictly regulated and politically sensitive market. In challenging situations where market interests stand against the threat of discriminatory action, equal treatment should thrive. Political or legal goals must accordingly give way to equal treatment. This has been a challenge for the EU, which faces strong external competition in respect of its natural gas market, given supply capacity within the EU does not meet demand. While Russia-based companies are capable of supplying the EU gas market with competitive gas, diversification of the EU's gas supplies can be seen to stand in the way of market fundamentals.<sup>120</sup> This is covered in a practical manner below by reference to case-law. The issue of third country company access to EU gas markets has challenged the EU's energy objectives, and it has proven difficult to achieve compromise between the aims of third country companies and those of the EU in this area. In situations where these interests are in conflict, it is indisputable that compromise must be achieved to secure equal treatment for third country companies in the EU natural gas market.

From a legal perspective, discrimination means that one party is treated in a different manner from other parties even though the relevant circumstances are similar. When no robust grounds for different treatment exist, market interests must adapt to the circumstances. As the case-law discussed below indicates, this has not always been the approach followed. Instead, the EU has acted in a discriminatory way by justifying the action taken by reference to its own market interests.

In free markets, and under EU competition law and international legal instruments,<sup>121</sup> non-discrimination is a fundamental principle, which extends to market access. In situations where

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<sup>120</sup> Gaurav Sharma, 'Opposition to Nord Stream 2 ignores market fundamentals', 14 December 2018, *Energy Post*, available at <https://energypost.eu/opposition-to-nord-stream-2-ignores-market-fundamentals-energy-post-weekly/> (last accessed on 20 June 2019).

<sup>121</sup> The equal treatment goal appears under EU law, the national laws of Member States and international agreements on trade, such as the MFN principle of the GATT and GATS agreements.

securing an internal market objective is discriminatory, the markets must adapt to the situation by removing the legal hurdles that impede or prevent equal treatment. This applies to the situation where discrimination is inherent in the legislation that is adopted.

The legal basis of third country companies' access to the EU's internal gas market is mainly examined by reference to Article 2(17) and Article 11 of the Gas Market Directive in this paper. As there are no distinct rules on market access for such companies, these provisions set out the basis on which the EU and its Member States may, in certain situations, block access for third country companies. Article 11 covers certification of third country TSOs and Article 2(17) lays down a definition of 'interconnector'. This definition is the subject of a proposed amendment to the Directive, which, if adopted, would lead to legal complications in relation to pipelines accessing the EU internal gas market from third countries. This issue is discussed in detail below.

## **4 THE DEVELOPMENT OF EU NATURAL GAS REGULATION**

### **4.1 Case-law**

This section covers certain legislative issues in the EU natural gas sector. As the main focus is on access to the EU natural gas market and the challenges this poses for third country companies, the examination focuses on specific issues that arise in this context. The legal cases that have been heard are assessed critically, as is the applicable legislation and, to the extent relevant, other actions that have been taken that have an impact on stakeholders. This survey is important in order to provide insight into the legal and political developments that have impacted on EU natural gas legislation insofar as discrimination in relation to third country company access is concerned. First, the examination briefly focuses on the legislation relating to certification of third country transmission system owners and TSOs in the EU natural gas market – also referred to as the 'Gazprom clause' – in order to examine unfair treatment on the EU gas market in greater depth in chapter 5, where the matter is examined through the lenses of EU and international law. After this the focus is placed on the Nord Stream 2 project through an assessment of the legislative amendment, i.e. Lex Nord Stream 2, and its political background.

## 4.2 Gazprom clause

The Gazprom clause<sup>122</sup> concerns the certification of third country TSOs in the EU market and is enshrined in Article 11 of the Gas Market Directive. The focus here is on the politics behind the norm and the controversy it has caused in the light of the principles of market access and non-discrimination based on EU as well as international law.

The Third Energy Package brought significant changes on the EU gas market. The above-mentioned principles, which form part of the general aim of opening up the internal gas market within the EU, have had an impact on the functioning of the market. Article 11 of the Gas Market Directive, which is a component of the Third Energy Package, has been criticised on the basis that it creates controversy in the context of the EU's external energy policy.<sup>123</sup> This article relates to unbundling of market infrastructure ownership. In addition, as Russia has a large market share in respect of EU natural gas imports, it is viewed as having been targeted against Russia and, more precisely, Gazprom due to the failure of attempts to conclude bilateral trade agreements between EU and Russia.<sup>124</sup> It is also questionable whether this provision is compatible with WTO obligations.<sup>125</sup>

It is argued that the Gazprom clause enhances security of supply in the internal gas market by fully applying the unbundling scheme, as set out in the Gas Market Directive and briefly explained above, to third country companies exporting natural gas to the EU market, and thus extending EU natural gas rules to cover third countries operating in the EU internal gas market. The EU legislators view non-applicability of these rules as a threat to the security of the gas supply to the EU, as outlined in recital 22 of the Gas Market Directive.<sup>126</sup> In order to prevent

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<sup>122</sup> Also known as 'Lex Gazprom' and the 'third country clause'.

<sup>123</sup> Ana Stanic, 'New EU Rules on the Internal Energy Market and Energy Policy', [2011] 9(5) *Oil, Gas & Energy Law Intelligence*, p. 8.

<sup>124</sup> See 'Gazprom clause' issues Russia ultimatum for energy co-operation, 2007, available at <https://www.euractiv.com/section/med-south/news/gazprom-clause-issues-russia-ultimatum-for-energy-co-operation/> (last accessed on 21 June 2019).

<sup>125</sup> Thomas Cottier, Sofya Matteotti-Berkutova and Olga Nartova, 'Third Country Relations in EU Unbundling of Natural Gas Markets: The "Gazprom Clause" of Directive 2009/73 EC and WTO Law', [2010/06] *World Trade Institute*, p. 1.

<sup>126</sup> Recital 22 of the Gas Market Directive states as follows: 'The security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in gas and the integration of the isolated gas markets of Member States. Gas can reach the citizens of the Union only through the network. Functioning open gas markets and, in particular, the networks and other assets associated with gas supply are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union. Persons from third countries should therefore only be allowed to control a transmission

third country TSOs on the EU gas market from controlling the EU energy transmission, Member State national regulators may refuse certification of third country TSOs based on the requirements set out in Article 11. Article 11(1) to (3) state as follows:

‘1. Where certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries, the regulatory authority shall notify the Commission. The regulatory authority shall also notify to the Commission without delay any circumstances that would result in a person or persons from a third country or third countries acquiring control of a transmission system or a transmission system operator.

2. The transmission system operator shall notify to the regulatory authority any circumstances that would result in a person or persons from a third country or third countries acquiring control of the transmission system or the transmission system operator.

3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:

(a) that the entity concerned complies with the requirements of Article 9; and

(b) to the regulatory authority or to another competent authority designated by the Member State that granting certification will not put at risk the security of energy supply of the Member State and the Community. In considering that question the regulatory authority or other competent authority so designated shall take into account:

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system or a transmission system operator if they comply with the requirements of effective separation that apply inside the Community. Without prejudice to the international obligations of the Community, the Community considers that the gas transmission system sector is of high importance to the Community and therefore additional safeguards are necessary regarding the preservation of the security of supply of energy to the Community to avoid any threats to public order and public security in the Community and the welfare of the citizens of the Union. The security of supply of energy to the Community requires, in particular, an assessment of the independence of network operation, the level of the Community's and individual Member States' dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country. Security of supply should therefore be assessed in the light of the factual circumstances of each case as well as the rights and obligations arising under international law, in particular the international agreements between the Community and the third country concerned.’



- (i) the rights and obligations of the Community with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of energy supply;
- (ii) the rights and obligations of the Member State with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with Community law; and
- (iii) other specific facts and circumstances of the case and the third country concerned.’

Article 11 of the Gas Market Directive clearly shows the EU legislator’s concerns in relation to third country natural gas suppliers operating on the Member States’ gas markets. It is viewed as a measure against the Russian-owned energy company Gazprom that is designed to prevent it from acquiring shares in the European energy businesses, as the unbundling scheme would have allowed investment by third country companies of the natural gas network by circumventing the EU unbundling scheme.<sup>127</sup> As the third country clause gives national regulators the option, based on a security assessment that is not part of certification for EU companies as mentioned above, to refuse to certify companies from third countries into the EU gas market against Article 9 of the Gas Market Directive, this measure is regarded as being not only politically problematic, but also legally problematic under international trade law, among other relevant laws.

The question of whether the Gazprom clause amounted to discrimination was examined by the WTO after Russia filed a claim against the EU.<sup>128</sup> In its ruling, the WTO panel did not consider that the certification measures violated the General Agreement on Trade in Services (GATS).<sup>129</sup> In other words, the ruling was in favour of the EU as it was not seen as being discriminatory against Russia. Russia’s claim argued that the third-country certification measure was more favourable to certain third countries that have concluded agreements with the EU, compared to

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<sup>127</sup> Simon Taylor, ‘EU struggles to agree on anti-Gazprom clause’, [2008] Politico, available at <https://www.politico.eu/article/eu-struggles-to-agree-on-anti-gazprom-clause/> (last accessed on 21 June 2019).

<sup>128</sup> See, e.g., <http://euobserver.com/news/123984> (last accessed on 20 June 2019).

<sup>129</sup> WTO Panel Report, European Union and its Member States — Certain Measures Relating to the Energy Sector (EU – Energy Package), WR/DS476/R, circulated to Members on 10 August 2018.

third countries that have not concluded such agreements.<sup>130</sup> The wording of Russia's panel request regarding this issue is as follows:

'In addition, pursuant to the Directive, requests for certification by a transmission system owner or TSO located in one EU Member State, but controlled by a person or persons of another Member State, are not subject to the third-country certification measure. The services and service suppliers of one EU Member State are thus treated more favorably by other Member States than are the services and service suppliers of other third-countries, including Russia. This is despite the fact that the EU and each such Member State is also a Member of the WTO. The Russian Federation considers this measure to be inconsistent, de jure, with the EU Member States' obligations under Article II:1 of the GATS to accord immediately and unconditionally to services and service suppliers of each Member treatment no less favourable than that it accords to like services and service suppliers of any other country.'<sup>131</sup>

The conclusion of the ruling was that the panel did not accord the third-country certification measure as being less favourable to Russian pipeline transport services or service suppliers, compared to the non-EU countries' services, under Article II:1 of GATS. The panel based this decision on, for example, market custom regarding the security of supply assessment.<sup>132</sup>

Even with the WTO panel conclusion, it is clear that Article 11 of the Gas Market Directive clearly places third country companies in a different position compared to Member States' companies regarding investments and operations in the EU markets.

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<sup>130</sup> *ibid.*, pp. 89-90.

<sup>131</sup> Request for the establishment of a panel by the Russian Federation, European Union and its Member States — Certain Measures Relating to the Energy Sector, WT/DS476/2, 28 May 2015, p. 3.

<sup>132</sup> WTO Panel Report, European Union and its Member States — Certain Measures Relating to the Energy Sector (EU – Energy Package), WR/DS476/R, circulated to Members on 10 August 2018, pp. 310-311.

### 4.3 The Nord Stream 2 project

This section assesses the much-debated<sup>133</sup> Nord Stream 2 project<sup>134</sup> from a legal and a political perspective. The issues of legal and political discrimination in relation to third country company access are discussed by reference to a case study. In this context, the Nord Stream 2 project is a good example of how politics can drive legislative actions in the EU, based on a single project. The examination focuses on the reasons for opposition to the project and the aim of the EU legislative amendment, as well as what I believe the outcome of the actions taken by the Commission will or should be. The aim of this analysis is to assess the discriminatory hurdles that Gazprom is being asked to clear.

The Nord Stream 2 undertaking, which has major European energy companies as investors and is fully owned by Gazprom,<sup>135</sup> is set to annually deliver 55 billion cubic metres of natural gas to the EU by the beginning of 2020.<sup>136</sup> The pipeline is to be constructed in the Baltic Sea, connecting the Russian natural gas infrastructure with Germany.<sup>137</sup> This is deemed to be the most efficient route for the transportation of Russian gas to the EU.<sup>138</sup> The project follows the Nord Stream project completed in 2012. Although there are different legal entities behind the projects, the pipeline of this follow-up project will run geographically almost identically with the first one.

Nord Stream 2 has run into significant political opposition, as compared with the Nord Stream project.<sup>139</sup> The Commission has strongly opposed the project, as have some EU and other

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<sup>133</sup> Alan Riley, 'A Pipeline Too Far? EU Law Obstacles to Nordstream 2', [2018] *International Energy Law Review*.

<sup>134</sup> Nord Stream 2 AG is a Swiss-based project development company owned by Gazprom PJSC.

<sup>135</sup> For further information on the project shareholder and financial investors, see <https://www.nord-stream2.com/company/shareholder-and-financial-investors/> (last accessed on 21 June 2019).

<sup>136</sup> For information on the background to the project, see <https://www.nord-stream2.com/en/pdf/document/4/> (last accessed on 21 June 2019).

<sup>137</sup> The Nord Stream 2 pipelines consist of two pipes that are to be laid on the Baltic seabed. In this paper, 'pipeline' covers both these pipes.

<sup>138</sup> For information on the logistics of the project, see <https://www.nord-stream2.com/en/pdf/document/110> (last accessed on 21 June 2019).

<sup>139</sup> The Nord Stream project was backed by the EU as a project of common interest (PCI) in accordance with Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, 25.4.2013, p. 39). In this context, this project was seen to be beneficial for the EU's internal energy market.

countries (for example, Poland, Ukraine and the US) and other market players.<sup>140</sup> The questionable actions against the project, which are relevant in assessing the discriminatory dilemma the project has caused within the EU, are assessed in the sections below. The project's impact on the EU natural gas market is examined on a general level, without identifying the varying impacts on different regions to any great extent.<sup>141</sup>

#### 4.3.1 Challenges to the project

This section covers the politically tense situation around the Nord Stream 2 project and the basis of the challenges to the project. First, one of the most serious arguments against the project is that it will have an adverse impact on the EU's energy security.<sup>142</sup> This issue, which is bound up with geopolitics, represents a legal requirement in respect of the EU energy sector.<sup>143</sup> Consequently, the EU's energy security is approached by examining the challenges to the project and its impact on security of supply. As discussed below, security of supply is closely linked to other EU energy objectives, such as the diversification of energy supplies. As the Nord Stream 2 project will increase infrastructure to gas fields already exporting gas to the EU,<sup>144</sup> it does not diversify the EU's natural gas supply. This threat, emphasised by Poland, among others,<sup>145</sup> may have an impact on gas flows in the internal market, as it is viewed as being likely to reduce the amount of natural gas running through the Ukrainian pipelines (Western corridor), Belarus and Poland (Yamal pipelines).<sup>146</sup> On the other hand, stakeholders argue the project will decrease natural gas prices in the EU (or at least in certain countries) as the bypassing of the Eastern border will mean that costly tariffs will be avoided. Nonetheless, assurances have been

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<sup>140</sup> See, e.g., the following articles concerning opposition to the Nord Stream 2 project: <https://www.atlanticcouncil.org/blogs/new-atlanticist/nord-stream-2-is-a-bad-deal-for-europe/>; <https://euobserver.com/opinion/139303>; <https://www.politico.eu/article/russia-nord-stream-2-pipeline-should-not-be-built-poland-konrad-szymanski/>; and <https://www.euractiv.com/section/energy/news/poland-attacks-eus-gazprom-deal-in-court/> (last accessed on 21 June 2019).

<sup>141</sup> In this context, the project is regarded as creating further divisions between Western Europe and certain East European countries (excluding Russia), such as Ukraine. See, e.g., <https://www.irishtimes.com/news/world/europe/nord-stream-2-gas-pipeline-from-russia-that-s-dividing-europe-1.3571552> (last accessed on 21 June 2019). This issue is briefly assessed below.

<sup>142</sup> See, e.g., Riley 2018 ('Nord Stream 2: Understanding the Potential Consequences'), p. 2.

<sup>143</sup> Jerzy Dudek and Andris Piebalgs, 'Nord Stream 2 and the EU Regulatory Framework: Challenges Ahead', [2017/26] European University Institute, p. 5.

<sup>144</sup> *ibid.*

<sup>145</sup> See, e.g., <http://biznesalert.com/nord-stream-2-not-diversification/> (last accessed on 20 June 2019).

<sup>146</sup> Dudek and Piebalgs 2017, p. 5.

given by Angela Merkel, Chancellor of Germany, that the supply of gas through Ukraine will continue after the realisation of the project.<sup>147</sup> Even if gas continues to be supplied through the Western corridor, these pipelines are outdated and will require replacement or repair in the future.<sup>148</sup>

The significant amount of natural gas consumed in the EU gas market has the potential to be increased after the project is completed. However, this depends on the other sources of gas supply to the EU, and is also a competition question, i.e. free trade may decrease the large amount of Russian gas being supplied to the EU market. The supply route from Russia to Ukraine will, as mentioned above, be bypassed by the Nord Stream 2 pipeline, and in this context, the tariff income Ukraine currently receives for gas flows through its pipelines could be impacted. This is one of Ukraine's main grounds for objecting to the project, together with its contentious relationship with Russia. The likely benefit for the natural gas internal market is that, as compared to the Ukraine pipeline, the supply of gas through the Nord Stream 2 pipeline is likely to be more competitively priced and more secure, which should be in the interests of the EU as a whole. The fact that the Ukraine pipelines will require renewal in the future and are unable to meet demand in the EU for natural gas during high demand peaks, such as during cold winter months, suggests that both pipeline routes will be needed to cover this demand gap.<sup>149</sup> While the project will not diversify the sources of supply, it will however diversify the supply routes of Russian gas to the EU and avoid the Ukrainian route which has been subject to transit disputes in the past, 2006 Ukraine gas crisis in particular.<sup>150</sup> This was noted in the Council Legal Service opinion assessing a Commission request for intergovernmental agreement between EU and Russia covering Nord Stream 2 pipeline. According to the Council Legal Service this transit itself represented a risk of disrupted supply of natural gas to the EU. With this in mind, the Council Legal Service took the position that 'it is prima facie evident that the opening of alternative routes with augmented capacity would increase the ability of the

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<sup>147</sup> See, e.g., <https://www.politico.eu/article/merkel-and-putins-gas-diplomacy/> (last accessed on 20 June 2019).

<sup>148</sup> 'Nord Stream 2 and Ukraine: Costs Should Decide', National Energy Security Fund, 2016, available at [https://brusselsenergyclub.org/get\\_file/id/nord-stream2final.pdf](https://brusselsenergyclub.org/get_file/id/nord-stream2final.pdf) (last accessed on 24 June 2019), p. 5.

<sup>149</sup> The Oxford Institute for Energy Studies 2018. 'Gazprom in Europe – two "Anni Mirabiles", but can it continue?', pp. 16-17.

<sup>150</sup> <https://www.reuters.com/article/us-russia-ukraine-gas-timeline-sb-idUSTRE50A1A720090111> (last accessed on 20 June 2019).

Union to be unaffected by such disputes and therefore the resilience of the Union's external supply networks to international incidents over which it has no direct control.’<sup>151</sup>

In addition to the challenges relating to the infrastructure, the environmental impacts that natural gas brings are another subject of public debate. Critique of the impacts of both the construction of the pipelines and the CO<sub>2</sub> emissions that the project will produce, as compared to, for example, the use of renewable energies, has been a ground for opposing the project. While it is clear that natural gas entails larger CO<sub>2</sub> emissions compared to renewables, it is also the case that it involves lower emissions than are produced by crude oil or coal-based energy production.<sup>152</sup> In the context of climate change, the transition towards renewable energy sources has begun.<sup>153</sup> In this transition, natural gas still plays a significant role, as there is a need for energy sources to fill the gap while the process of transition is ongoing.<sup>154</sup> In this context, natural gas is an important energy source as the adverse environmental impacts it causes are minor compared to oil or coal. In addition, the predicted demand for natural gas on the EU internal market shows that the EU is yet not ready for an immediate transition to renewable energy sources. This, together with the decline in natural gas production within the EU, shows the growth in demand on the internal market that is likely to take place in the future.<sup>155</sup>

The economic rationale of the project has also been questioned, which is another ground for opposition to the project.<sup>156</sup> This can be purely seen as a market-based question, which should be based on market needs. As the EU's own predictions, together with other forecasts, show that there will be an increasing demand for gas in the EU,<sup>157</sup> potential economic risks should be

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<sup>151</sup> <http://www.politico.eu/wp-content/uploads/2017/09/SPOLITICO-17092812480.pdf> (last accessed on 20 June 2019).

<sup>152</sup> See, e.g., <https://www.eia.gov/tools/faqs/faq.php?id=73&t=11> (last accessed on 20 June 2019).

<sup>153</sup> See the conditions in the Paris Agreement that combat climate change, 2016, available at [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) (last accessed on 20 June 2019).

<sup>154</sup> Sharma 2018.

<sup>155</sup> EU Reference Scenario 2016, ‘Energy, transport and GHG emissions, Trends to 2050’, available at [https://ec.europa.eu/energy/sites/ener/files/documents/20160713%20draft\\_publication\\_REF2016\\_v13.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/20160713%20draft_publication_REF2016_v13.pdf) (last accessed on 22 June 2019).

<sup>156</sup> Barnes 2017 (‘Nord Stream 2, Friend or enemy of energy security in Europe’), p. 1.

<sup>157</sup> See, e.g., ‘EU Reference Scenario 2016. Energy, transport and GHG emissions, Trends to 2050’; and Prognos 2017, ‘Final Report - Current Status and Perspectives of the European Gas Balance: Analysis of EU 28 and Switzerland,’ available at [https://www.prognos.com/uploads/tx\\_atwpubdb/20170406\\_Prognos\\_study\\_European\\_Gas\\_Balance\\_final\\_1\\_01.pdf](https://www.prognos.com/uploads/tx_atwpubdb/20170406_Prognos_study_European_Gas_Balance_final_1_01.pdf) (last accessed on 22 June 2019).

borne by the investors. Free trade in this sense, as it does not infringe EU law, should thrive and constitute a ground for undertaking the project.

This analysis of the criticism levelled against the project shows that it is not well grounded and that the arguments utilised are poor and partially erroneous. These arguments may be regarded as being based on the political challenges the EU and certain of its Member States have experienced in their dealings with Russia in relation to the energy sector, and on the geopolitical relationships between these parties. In this context, the political influence a Russia-based company may acquire through the project has been seen as a political power tool.<sup>158</sup> It is argued, on the strength of this perception, that Gazprom will be in a position to influence the natural gas price on the internal market through its dominant position, as the project does not diversify the EU's gas supply. There is expected to be a shortfall between available supply and the demand for gas in the EU, and this must ultimately be filled either by Russian pipeline gas or, alternatively, more expensive LNG (such as US LNG).<sup>159</sup> In the internal gas market, consumers can freely choose the source of the gas they buy. From a security of supply and market functioning perspective, the concerns engendered by the project should not present an insurmountable challenge. In the event that Gazprom's objectives turn out to be purely political, the EU can alleviate any pressure from the east by using alternative supplies such as LNG, as it has capacity to cope with increased LNG imports.<sup>160</sup> This is further supported by the fact that Gazprom, as a TSO, cannot have control over the gas flow within the internal gas market.<sup>161</sup> Finally, as the purpose of diversifying the EU's energy supplies is to secure the supply of energy to the internal market regardless of the political situation at hand, the ability to switch to alternative energy sources enhances security of supply. Therefore, it is not a question of purely relying on one dominant supplier of natural gas to the EU.

While the Nord Stream 2 project is seen as a political project by its opponents, Gazprom and the Russian government, together with investors in the project, insist that its aims are

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<sup>158</sup> See, e.g., Radio Free Europe, 'U.S. House Of Representatives Condemns Russia's Nord Stream 2 Pipeline', 12 December 2018, available at <https://www.rferl.org/a/u-s-house-of-representatives-condemns-russia-s-nord-stream-2-pipeline/29651530.html> (last accessed on 24 June 2019).

<sup>159</sup> Prognos Report, 'Final Report - Current Status and Perspectives of the European Gas Balance: Analysis of EU 28 and Switzerland', p. 52.

<sup>160</sup> Barnes 2017 ('A bigger role for gas in the EU energy mix?'), p. 29.

<sup>161</sup> Arnoud Willems, Jung-ui Sul and Yohan Benizri, 'Unbundling As a Defence Mechanism Against Russia: Is the EU Missing the Point?', [2009] 7(2) *Oil, Gas & Energy Law Intelligence*, p. 1.

economic.<sup>162</sup> The project's opponents, including the Commission, see it as a geopolitical project whose aim is to avoid Ukrainian gas tariffs and obtain more extensive influence over the EU energy market.<sup>163</sup> From an economic, market-based view, it makes sense to export gas at the least possible cost. While the EU has other possibilities to deal with the geopolitical situation on the energy field, it may be regarded as strange to oppose the project purely on the basis of this argument. Furthermore, as the project secures supply during high demand peaks, it would appear to be in the EU's interests.

From a supply security standpoint, it appears questionable to rely on an outdated pipeline system that supplies approximately 80% of natural gas to the EU market from Russia.<sup>164</sup> In addition, the building of new pipelines means that disruption caused by an incident on another pipeline can be minimised by switching to the new pipeline. Additionally, diversifying the import pipelines from Russian gas fields such as the Bovanenkovo field would ensure an adequate supply of gas during periods of peak demand.

Political challenges, as are apparent from the arguments against the project, place formidable obstacles in the path of the Nord Stream 2 project's access to the EU gas market. While the project has been criticised from the outset, attempts to block access have not been successful, as these have not been sufficiently fact-based, as mentioned above. In this regard, the degree of political influence exerted may be viewed as small. The Commission's legislative actions against the project are also dogged by similar shortcomings, as discussed in the next section.

#### 4.3.2 Lex Nord Stream 2

The steps taken in relation to this issue by the EU or, more precisely, by the Commission, can be understood as counteractions against Gazprom that aim at blocking it from accessing the EU

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<sup>162</sup> See, e.g., <https://www.euractiv.com/section/energy/news/putin-and-merkel-meet-to-find-solution-on-gas-pipeline-nord-stream-2/> (last accessed on 20 June 2019).

<sup>163</sup> Briefing, EU Legislation in Progress: Common rules for gas pipelines entering the EU internal market 23 January 2018, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614673/EPRS\\_BRI\(2018\)614673\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614673/EPRS_BRI(2018)614673_EN.pdf) (last accessed on 24 June 2019), p. 2.

<sup>164</sup> 'Russian Gas Transit Across Ukraine Post-2019: pipeline scenarios, gas flow consequences, and regulatory constraints', February 2016, available at <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Russian-Gas-Transit-Across-Ukraine-Post-2019-NG-105.pdf> (last accessed on 24 June 2019), p. 4.



internal natural gas market. These steps take the form of legislative amendments that threaten the project's market access and its ultimate success, as discussed below. As there are no legal or political grounds on which to object to the Nord Stream 2 project, the Commission's actions amount to finding a solution to a non-existent problem and have therefore been regarded as discriminating strongly against Gazprom. This is assessed by examining the EU's legislative procedures and the way in which these have been challenged on the basis that they are simply wrong. This analysis is not intended to be exhaustive, but rather involves assessing the main elements of the legislative amendment, which is indicative of the legal and political aims behind the attempt to apply EU energy law to import pipelines from third countries.

In November 2017, the Commission proposed an amendment to the Gas Market Directive,<sup>165</sup> which would extend the common EU natural gas rules to import pipelines, such as the Nord Stream 2 pipeline. The proposal seeks to amend the legal definition of an interconnector to cover third country pipelines in the exclusive economic zone (EEZ) of EU Member States. This would have a significant impact on the Nord Stream 2 project, as discussed below. Article 49a of the amendment, which concerns derogations for Member States from the application of gas market rules is examined below by reference to the current status of the amendment.<sup>166</sup>

EU energy law does not apply to pipelines bringing gas to the EU market in relation to the section located in the EEZ of its Member States, but solely to pipelines located in the EU internal market.<sup>167</sup> The original proposal from November 2017 would have meant that, in the absence of the grant of an exemption in respect of a specific pipeline under the Gas Market Directive,<sup>168</sup> similar projects would have been bound by EU energy law. This would signify a change to previous market custom.<sup>169</sup>

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<sup>165</sup> European Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 8 November 2017, Brussels, COM(2017) 660 final.

<sup>166</sup> Article 49a have been inserted in the current amendment, as covered below.

<sup>167</sup> European Commission, letter from Vice President of the European Commission M. Šefčovič and Member of the European Commission M. A. Cañete. (12 September 2017) to J. Buzek, Chair of the European Parliament Committee on Industry, Research and Energy, 'Request pursuant to the Framework agreement – Nord Stream 2', available at <http://www.politico.eu/wp-content/uploads/2017/09/NS2-SPOLITICO-17091912000.pdf> (last accessed on 22 June 2019).

<sup>168</sup> The Gas Market Directive allows for derogations in relation to the application of certain gas market rules, such as third-party access, if the criteria are met.

<sup>169</sup> Severin Fischer, 'Lost in regulation: the EU and Nord Stream 2', 13 November 2017, *Energy Post*, available at <https://energypost.eu/lost-in-regulation-the-eu-and-nord-stream-2/> (last accessed on 22 June 2019).

The European Parliament's resolution of 2015,<sup>170</sup> which concerns the aim of further diversifying EU's natural gas supplies, stated that the use of natural gas undermines economic growth and democratic stability in Europe.<sup>171</sup> This paper was referred to in a 2017 document issued by the EP's Parliaments Committee on Industry, Research and Energy,<sup>172</sup> which was addressed to the EU Energy Council and tackled the problem of applying EU law to the Nord Stream 2 project. It stated that the project goes against EU's aim of diversifying gas supplies to EU, characterising it as 'exposing and deepening the vulnerability of a number of Member States and undermining the energy security of the EU as a whole'. In this context, the European Council's conclusion of December 2015 argued that the Third Energy Package and the Energy Union's objectives should apply to infrastructure from third countries.<sup>173</sup> The application of EU energy law to such pipelines was supported by ITRE. The fact that it is proposed that the Nord Stream 2 project will traverse the international waters (i.e. the EEZ) of Russia, Finland, Sweden, Denmark and Germany means that it will be subject to EU energy legislation outside the territory of the internal natural gas market.<sup>174</sup>

This proposed amendment, which seeks to apply EU energy law such as the Gas Market Directive to pipelines within the EEZ of certain Member States, would violate Articles 56 and 58 of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>175</sup> Article 56 grants coastal states the right, inter alia, to explore and exploit its EEZ. Article 58 provides that other states have the right to lay submarine pipelines in the EEZ territories of other states. This right applies to the continental shelf of coastal states, subject to consent of the coastal state, as regulated under Article 79 of UNCLOS. The present situation, therefore, does not allow for the application of EU energy legislation in respect of international waters outside the internal

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<sup>170</sup> European Parliament resolution of 15 December 2015 on Towards a European Energy Union (2015/2113(INI)), point 21, p. 6.

<sup>171</sup> *ibid.*

<sup>172</sup> Committee on Industry, Research and Energy, 'Diversification of energy routes and suppliers: an essential complementary measure for the success of the EU Energy Union objectives', 23 February 2017, available at [http://www.politico.eu/wp-content/uploads/2017/02/8704\\_Buzek\\_Energy-Council\\_NS2\\_HK\\_SCAN-2.pdf](http://www.politico.eu/wp-content/uploads/2017/02/8704_Buzek_Energy-Council_NS2_HK_SCAN-2.pdf) (last accessed on 22 June 2019).

<sup>173</sup> General Secretariat of the Council: European Council meeting 17-18 December 2015 – Conclusions, p. 7.

<sup>174</sup> In addition to passing through the EEZ of these states, the pipeline traverses the territorial waters (i.e. the continental shelf) of Russia, Denmark and Germany. However, due to objections on the part of Denmark to the pipeline going through its territorial waters, the pipelines may pass outside them. See, e.g., <https://www.offshoreenergytoday.com/nord-stream-2-pipeline-to-bypass-danish-territorial-waters/> (last accessed on 20 June 2019).

<sup>175</sup> United Nations Convention on the Law of the Sea of 10 December 1982.

energy market. Therefore, on the basis of both market custom and various enactments, pipelines in the EEZ are subject to international law (in the form of UNCLOS), EU law, and the national law of the state through which the pipeline passes (in the form of the national permitting legislation for undertakings in the EEZ and continental shelf that applies to pipelines). In addition, environmental impact legislation must be complied with.<sup>176</sup>

The Commission argued that the reason for the legislative amendment being proposed is to avoid the Nord Stream 2 pipeline being built in a legal void in which it would not be subject to any law. In this context, the Commission also argues that a conflict of laws exists in relation to the Baltic Sea that can be resolved by applying EU energy law to the pipeline.<sup>177</sup> However, it is apparent from looking at international law, EU law and the national laws of the countries through which the pipeline will pass, that it is not subject to a legal void. On the contrary, it is strongly regulated, as are the similar pipelines that already exist and which bring gas into the EU internal market.<sup>178</sup>

In seeking to apply EU energy law to the pipeline, the Commission has also sought to open negotiations with Russia regarding the application of EU energy law principles to the operation of the pipeline. An intergovernmental agreement (IGA) proceeding was started in June 2017 by asking the Council for a mandate authorising EU to start the negotiations.<sup>179</sup> At this time, the request was not approved.<sup>180</sup> Since the existing pipelines that bring natural gas to the EU market from third countries are not subject to the EU rules on natural gas, it would be rather arbitrary that one pipeline would be bound by these rules. The request by the Commission was turned

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<sup>176</sup> In the Nord Stream 2 case, this is the national legislation of the countries through which the pipeline passes, which lays down an obligation to carry out an environmental impact assessment (EIA), as well as a transboundary impact assessment, in accordance with the UN's Espoo Convention on Environmental Impact Assessment in a Transboundary Context 1997, available at [https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo\\_Convention\\_authentic\\_ENG.pdf](https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf) (last accessed on 24 June 2019).

<sup>177</sup> Fischer 2017.

<sup>178</sup> The Transmed, Medgaz, Greenstream and Mafhreb pipelines deliver gas to the border of the EU internal market from third countries. In addition, the Nord Stream project, which is almost identical to the Nord Stream 2 project, is not subject to EU energy law.

<sup>179</sup> European Commission – Press release: ‘Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2’, 9 June 2017, available at [europa.eu/rapid/press-release\\_IP-17-1571\\_en.pdf](http://europa.eu/rapid/press-release_IP-17-1571_en.pdf) (last accessed on 22 June 2019).

<sup>180</sup> Council of the European Union, Recommendation for a Council Decision authorising the opening of negotiations of an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline, 12 June 2017, available at <http://www.politico.eu/wp-content/uploads/2017/07/NS-Draft-Mandate.pdf> (last accessed on 22 June 2019).

down by the Council's Legal Services,<sup>181</sup> as expected, given that there were no legal grounds for it. The Council's legal arm stated that the Commission's argument that a legal void and a conflict of laws would be brought into existence on construction of the pipeline were erroneous and could not, therefore, be the legal basis for such negotiations, as this was not within the exclusive competence of the EU. The Opinion noted that Article 194 TFEU<sup>182</sup> does not offer a legal basis for negotiations and that the Gas Market Directive is not applicable to the pipeline.<sup>183</sup> Therefore, the Commission has not been given the right to start negotiations for an IGA with Russia.

It has become clear that EU energy law is not applicable in respect of sections of pipelines from third countries that lie outside EU territory. This is supported by various opinions, including the German gas market regulatory office (the *Bundesnetzagentur*), which stated in its letter to Director-General Ristori of the Commission (Directorate-General for Energy) that the Third Energy Package does not apply, nor shall it apply, to the Nord Stream 2 pipeline project.<sup>184</sup>

However, despite the various statements that have been made against the proposed amendment, given its discriminatory nature, the Commission still seeks to amend the Gas Market Directive by arguing that Nord Stream 2 would operate in a legal void.<sup>185</sup> An examination of the legislative text and its development is set out below.

In its November 2017 proposal for an amendment to the Gas Market Directive,<sup>186</sup> the Commission sought to amend the definition of an interconnector set out in Article 2(17) of the Directive. An interconnector is currently defined as a 'transmission line which crosses or spans

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<sup>181</sup> Council of the European Union, Opinion of the Legal Service on a Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues, 27 September 2017, available at <http://www.politico.eu/wp-content/uploads/2017/09/SPOLITICO-17092812480.pdf> (last accessed on 22 June 2019).

<sup>182</sup> As mentioned above, Article 194 TFEU lays down the objectives of the EU's energy policies within the internal market, and gives the Member States a certain right to act independently of the EU institutions in structuring their energy supply.

<sup>183</sup> Council of the European Union, Opinion of the Legal Service, 27 September 2017, p. 24.

<sup>184</sup> *Bundesnetzagentur* letter to Directorate-General for Energy, European Commission, 3 March 2017, p. 4-5.

<sup>185</sup> European Commission – Fact Sheet, Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC), 8 November 2017, available at [europa.eu/rapid/press-release\\_MEMO-17-4422\\_en.pdf](http://europa.eu/rapid/press-release_MEMO-17-4422_en.pdf) (last accessed on 22 June 2019).

<sup>186</sup> European Commission – Press release, 'Energy Union: Commission takes steps to extend common EU gas rules to import pipelines', 8 November 2017, available at [europa.eu/rapid/press-release\\_IP-17-4401\\_en.pdf](http://europa.eu/rapid/press-release_IP-17-4401_en.pdf) (last accessed on 22 June 2019).

a border between Member States for the sole purpose of connecting the national transmission systems of those Member States’. This definition clearly shows that it is intended to be applied in respect of natural gas pipelines within the internal EU market only. The proposed amendment sought to change this definition to a ‘transmission line which crosses or spans a border between Member States or between Member States and third countries up to the border of Union jurisdiction’, thus covering pipelines within the whole of the EU. The Nord Stream 2 pipelines would not fall within the scope of the definition of interconnectors currently in force under the Gas Market Directive. It is accordingly clear that the amendment is aimed at the Nord Stream 2 project. This contention is supported by the confidential document by the Commission, provided to ITRE.<sup>187</sup> Furthermore, the Commission’s actions may be regarded as discriminatory in attempting to secure certain market interests.

The legislative amendment turned out to be incompatible with UNCLOS, as mentioned above. The Legal Services’ Opinion of March 2018 states that the EU does not have jurisdiction in relation to sections of pipeline located in the EEZ, in accordance with UNCLOS, as the objective of applying EU energy law to the pipeline in the EEZ is unrelated to the economic exploitation of the EEZ.<sup>188</sup> The CJEU’s interpretation of Articles 56 and 58 of UNCLOS supports this statement.<sup>189</sup> A separate opinion<sup>190</sup> submitted by the Legal Services to the Energy

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<sup>187</sup> European Commission, letter from Vice President of the European Commission M. Šefčovič and Member of the European Commission M. A. Cañete. (12 September 2017) to J. Buzek, Chair of the European Parliament Committee on Industry, Research and Energy, ‘Request pursuant to the Framework agreement – Nord Stream 2.

<sup>188</sup> Opinion of the Council’s Legal Service on Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC - compatibility with UNCLOS, 1 March 2018, available at <https://www.politico.eu/wp-content/uploads/2018/03/NS2-Gas-Legal-Opinion-March-2018.pdf> (last accessed on 22 June 2019). For that reason, the EP, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market, p. 11.

<sup>189</sup> See, e.g., judgment of 29 March 2007, *Aktiebolaget NN*, C-111/05, ECLI:EU:C:2007:195, paragraph 59 of which states that ‘the sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the Convention on the Law of the Sea. To the extent that the supply and laying of an undersea cable is not included in the activities listed in those articles, that part of the operation carried out in those two zones is not within the sovereignty of the coastal State. That finding is confirmed by Articles 58(1) and 79(1) of the Convention, which permit, subject to certain conditions, any State to lay undersea cables in those zones.’ This interpretation clearly shows that EU energy law cannot be applied to the EEZ, as would be the case in national territories of Member States.

<sup>190</sup> Opinion of the Council’s Legal Service on a Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas - Legal basis, allocation of competences, derogations, 26 March 2018, available at <https://www.euractiv.com/wp->

Working Party stated that when several conflicting jurisdictions apply to a pipeline, an IGA is necessary in order to resolve contradictory requirements. Furthermore, it expressed the view that Article 194 TFEU would be the legal basis for the amendment in the event that security of supply was enhanced, and also stated that the amendment would lead to a transfer of power from the Member States to the EU.<sup>191</sup>

As it became clear that the argument that a legal void would come into being was erroneous, and that the amendment would infringe UNCLOS, together with the fact that applying derogations would not be the solution to the ‘problem’, the Committee of the Regions (CoR) and the General Secretariat of the Council recommended a new amendment. The proposal by CoR suggested changing the Article 2(17) definition to the following:

““interconnector” means a transmission line which crosses or spans a border between Member States or — exclusively where the technical firm daily capacity of the overall set of existing infrastructures connecting the European Union to the third country from which the relevant infrastructure (completed subsequently to the date of adoption of this Directive) originates, as certified by the Agency, already (or jointly with that of the relevant new infrastructure) exceeds 40 % of the total technical firm daily capacity of infrastructures (including LNG terminals in the European Union) connecting the European Union, or relevant risk group as defined in Annex I to Regulation (EU) 2017/1938, with third countries, as certified by the Agency — between Member States and a third country.”<sup>192</sup>

The proposal was changed by the General Secretariat, by amending what was discussed with the Energy Working Party and Coreper, to the following: ““interconnector” means a transmission system which crosses or spans a border between Member States or a transmission system of an internal market dimension between a Member States and a third country up to the border of Union territory’.<sup>193</sup> While the Commission’s original proposal defined an

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content/uploads/sites/2/2018/03/2018-03-20Opinion-Council-LS-EC-amendment-3rd-Gas-Directive.pdf (last accessed on 22 June 2019).

<sup>191</sup> *ibid.*, p. 13.

<sup>192</sup> Opinion of the European Committee of the Regions — Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (2018/C 361/09) (OJ C 361, 5.10.2018, p. 72).

<sup>193</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 21 November

interconnector as a ‘transmission line’, the General Secretariat’s suggestion replaces this with ‘transmission system’. In addition, the territorial scope was amended by changing the definition of an interconnector to a system which spans ‘up to the border of Union territory’, instead of ‘up to the border of Union jurisdiction’ as per the Commission’s draft. This proposal would have had a practical impact for the Nord Stream 2 project, as EU territory extends up to the borders with third countries, i.e. to the EEZ territories of third countries. The proposal of extending the definition of an interconnector to cover EU territory would apply EU energy law up to the physical EEZ border. It would not, therefore, have been applicable in the international waters, and thus not up to the physical border of the third country. This, again, would mean that EU energy law could not be applied to the Nord Stream 2 pipeline in international waters. However, this more or less clarifies that the aim of the proposal is to apply EU energy law to the Nord Stream 2 pipeline.

In February 2019, following the Council’s proposal of January 2019,<sup>194</sup> another proposal was made in relation to the Gas Market Directive amendment.<sup>195</sup> This suggested the following definition of ‘interconnector’:

“‘interconnector’ means a transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those countries or a transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of the Member State’<sup>196</sup>

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2018, available at <http://data.consilium.europa.eu/doc/document/ST-14560-2018-INIT/en/pdf> (last accessed on 21 June 2019), p. 6.

<sup>194</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 9 January 2019, available at [https://www.politico.eu/wp-content/uploads/2019/01/SPOLITICO-19011118350.pdf?utm\\_source=POLITICO.EU&utm\\_campaign=3a0af18451-EMAIL\\_CAMPAIGN\\_2019\\_01\\_13\\_07\\_09&utm\\_medium=email&utm\\_term=0\\_10959edeb5-3a0af18451-190118429](https://www.politico.eu/wp-content/uploads/2019/01/SPOLITICO-19011118350.pdf?utm_source=POLITICO.EU&utm_campaign=3a0af18451-EMAIL_CAMPAIGN_2019_01_13_07_09&utm_medium=email&utm_term=0_10959edeb5-3a0af18451-190118429) (last accessed on 22 June 2019).

<sup>195</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – Mandate for negotiations with the European Parliament, 11 February 2019, available at <https://data.consilium.europa.eu/doc/document/ST-5874-2019-REV-1/en/pdf> (last accessed on 22 June 2019).

<sup>196</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – Analysis of the final compromise text with a view to agreement, 14 February 2019, available at <https://data.consilium.europa.eu/doc/document/ST-6351-2019-INIT/en/pdf> (last accessed on 22 June 2019).

In February 2019, the trilogue<sup>197</sup> reached a compromise in respect of the legislative amendment. In the version that arose from this, Germany and France settled on amending the definition of interconnector so that the Gas Market Directive applies in the territory and territorial sea of the Member State where the first interconnection point is located.<sup>198</sup> The compromise text in the amendment alters the territorial scope from the previous proposals by applying EU energy law in relation to the internal territories of the energy market, i.e. in the territorial seas of the Member States *where the first interconnection is located*. This text has the merit of eliminating the violation of UNCLOS present in the texts of the previous proposals because the application of EU energy law is not extended to international waters. In relation to the Nord Stream 2 project, the application of EU energy law accordingly begins at the border between the Germany's territorial waters and its EEZ.

While the proposed amendment to Article 2(17) of the Gas Market Directive alters the definition of an interconnector, the version of Article 49a that the Commission proposed to insert into the Directive would have allowed an exemption from the application of EU energy law in relation to pipelines completed before the entry into force of the amended Gas Market Directive.<sup>199</sup> This change, proposed in November 2018, was accordingly also discriminatory towards the Nord Stream 2 project, as it would be treated differently from projects constructed under the same legislative conditions, since the Nord Stream 2 pipeline would not be covered by this derogation. A new version of Article 49a was set out in the most recent proposal (of February 2019),<sup>200</sup> concerning derogations in relation to transmission lines to and from third countries. It reads as follows:

‘[ ]In respect of gas [ ]transmission lines between a Member State and a third country[ ] completed before [PO: date of entry into force of this Directive], the Member State [ ] where the first connection point of the said transmission line with a Member State's

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<sup>197</sup> The trilogue is a type of meeting used in the EU for negotiations between the Parliament, the Council and the Commission over legislative proposals.

<sup>198</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – Analysis of the final compromise text with a view to agreement, 14 February 2019, recital 5.

<sup>199</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 21 November 2018, p. 9.

<sup>200</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – Analysis of the final compromise text with a view to agreement, 14 February 2019, p. 13.



network is located may decide, [ ], to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such [ ] gas transmission line located in its territory and territorial sea, [ ], for objective reasons [ ], such as enabling the recovery of the investment made or due to reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas in the Union, or the security of supply in the Union.

The derogation shall be limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above conditions.’

Due to the time limits laid down in this draft, derogations would be allowed for transmission lines completed before the date of entry into force of the amended Gas Market Directive. This allows for different treatment of transmission lines not completed at that date, thus further hindering the prospects of a derogation from the application of EU rules to the pipeline being granted in respect of the Nord Stream 2 project. The amendment does not comprehensively explain the objective reasons for granting a derogation. In this context, recovery of investments and security of supply are mentioned, and it is likely that such a decision would be evaluated by the Commission or the CJEU.<sup>201</sup> This, therefore, gives the Commission the upper hand over Member States in terms of deciding on a derogation in circumstances where a transmission line connects to the EU.

Whatever the Commission’s goals may be in relation to this amendment, it is apparent that it is directly aimed at the Nord Stream 2 project. While the legislative amendment proposed by the Commission would have created a conflict of laws that would legitimise a negotiating mandate, it can be seen that the Commission was looking for a problem as a pretext for the commencement of negotiations for an IGA. Therefore, its actions may be regarded as disproportionate in relation to the legal and political background.

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<sup>201</sup> Talus 2019, pp. 5-6.

## **5 IMPACT ON MARKET REGULATION**

### **5.1 Overview**

The examination of the legal cases in chapter 4 above makes it clear that the interaction between law and politics plays a significant role in shaping EU legislation. Political influence has strongly impacted market access for third countries in the EU internal natural gas market. The EU's underlying political goals, as discussed above, have set the scene in which EU legislators seek to direct the markets in a manner that suits the internal gas market and influence the political situation by endeavouring to keep EU relatively independent from Russia in the energy field. In this context, the influence of Russia and Gazprom may be regarded as problematic in relation to the effort to regulate the EU gas market efficiently. Although the EU's objectives in relation to the energy field – which are both market-based and (geo-)political – steer the decision and law-making processes, it is apparent that the actions it has taken have, in recent years, been disproportionate when measured against its underlying objectives. This is clear from an international law perspective as well as in terms of market custom and EU legislation.

The way the EU legislator has dealt with third country companies' market access may be regarded as disproportionate based on several legal principles that form part of both EU and international law. These include legitimate expectations, legal certainty and non-discrimination. These are assessed below, based on the situations at hand, with a view to gaining insight into why these principles have been set aside in pursuit of political objectives and the way in which this has impacted EU market regulation regarding third country company access.

### **5.2 Political impact on EU natural gas legislation**

Due to the various targets of political influence, as examined in chapter 2 above, politics play a significant role in EU law-making. This is obvious from the case studies discussed above, which show that the Gas Market Directive and, more precisely, the market access rules governing third country access to the internal market, have been subject to strong political influence. The case studies show that multiple underlying objectives are involved in the endeavour to secure EU internal market objectives by means of legislative measures. This section focuses on the impact of politics on EU natural gas legislation, without covering the

EU's political objectives behind the Gas Market Directive articles, which are assessed above in the case studies.

The actions taken by the Commission regarding Lex Nord Stream 2, in terms of seeking to treat, by legislative means, the building and regulation of a certain natural gas pipeline in a manner different from other existing pipelines that bring gas to the EU market, appear to be purely political in motivation. As there are no valid legal reasons for seeking to impact commercially driven projects in the way the Commission has done in relation to Nord Stream 2, it is apparent that energy and geopolitics have played a significant role in the amendments to the Gas Market Directive that have been proposed. While these amendments have been opposed by certain Member States, the trilogue came to a solution regarding the amendment, *inter alia*, of Article 2(17).<sup>202</sup> This solution is not regarded as entirely removing the discriminatory aspects of the amendment, as discussed in the case studies section above, on the strength of which it still appears that the politics behind the legislative changes trump the legal realities.

The main political dimension of the Nord Stream 2 project that impacts on the regulation of access to the EU gas market concerns the application of EU energy law to gas pipelines from third countries. As it is clear that the EU energy *acquis* is not binding in relation to the portions of these pipelines that lie outside the EU market, this issue has brought EU politics strongly to the fore. Legislative changes in relation to this issue should not be based on the arguments put forward by the Commission. The amendments to the Gas Market Directive that have been proposed have the clear political aim of seeking to prevent Gazprom from bringing more gas into the internal market. Due to this, the actions being taken by the EU have strong political impact on the market access rules in relation to third countries, as examined above, despite the fact that they should not be based on dubious political objectives, particularly where these cannot be legally justified. In this regard, the amendment to the Gas Market Directive being proposed may be characterised as casting aside general legal principles, such as non-discrimination, which are established features of both EU and international law. It is clear that the Lex Gazprom provision of the Gas Market Directive also fails to respect this principle.

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<sup>202</sup> General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – Analysis of the final compromise text with a view to agreement, 14 February 2019.

### 5.3 Discriminatory features of the Gas Market Directive

The EU's political standpoint in relation to the Nord Stream 2 project is, in my view, understandable. The tense situation of the Ukrainian crisis plays a significant role in the political views of the EU and certain of its Member States<sup>203</sup> towards the position Russia has acquired in relation to the EU as a result of the Nord Stream 2 project. However, the questionable actions taken by the Commission do not represent the right way to address the issue of safeguarding EU energy policies in respect of the market and to deal with political tensions. Instead, an approach in which the EU utilised the additional pipeline to secure its interests, for example, in terms of geopolitics, and make the whole of the EU internal market benefit from the project would have been a more understandable approach. The project is viewed as benefiting certain countries such as Germany, Austria and France, as the companies investing in the project are based in these countries, more than other countries, especially those in eastern Europe. Therefore, a different approach should be developed in which gas prices on the internal market as a whole would decrease. This would in turn benefit the EU gas market and all EU Member States. Although this would certainly be a challenging endeavour, it would be more beneficial to the EU internal market than seeking to block the entire project.

The political assessment above shows that politics, whether desirable or not, impact the actions of Member States as well as the EU in the energy field. The consequences of these actions may be harmful to the internal energy market, as discussed above. The discriminatory aspects of the Gas Market Directive are examined below by reference to the legal cases covered above and the impact the relevant regulations have had in terms of shaping market access for third countries. In this examination, EU and international law regarding non-discrimination are briefly assessed.

The principle of non-discrimination under EU law provides that 'comparable situations are not treated differently, unless such differences in treatment is objectively justified'.<sup>204</sup> This fundamental principle, established in CJEU praxis, provides the legal basis for non-discriminatory treatment on the EU energy field.<sup>205</sup> As examined above, Article 11 of the Gas

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<sup>203</sup> Not to mention the US, with its LNG market share on the line.

<sup>204</sup> Judgment of 7 June 2005, *VEMW and Others*, C-17/03, ECLI:EU:C:2005:362, paragraph 48.

<sup>205</sup> For Member States and system operators right to treat certain system users in a different manner from other system users on equal access to energy systems see, e.g., Hannah Kruimer, 'Exemptions to the Principle of Equal Access: An Overview of CJEU Cases by H. T. Kruimer', [2011] 9 (5) *Oil, Gas & Energy Law Intelligence*.

Market Directive allows for different treatment in the context of certification of third country TSOs in the EU gas market. It is questionable whether this, and the actions aimed at impeding the Nord Stream 2 project, can be objectively justified.

### 5.3.1 International law

The WTO, an intergovernmental organisation dealing with international trade between nations, views energy production as falling under the WTO framework. Other services in the energy field, such as transmission and distribution of energy, fall under the scope of GATS.<sup>206</sup> GATS consist of legally binding rules such as the most favoured nation (MFN) principle and market access rules, for example, non-discrimination and national treatment, which are relevant in relation to this examination.<sup>207</sup>

The MFN principle is laid down in Article 2 of GATS<sup>208</sup> and provides that Members of the WTO must treat other Members' service providers no more favourably than service providers from third countries, regardless of whether they are WTO Members or not. The rules on non-discrimination, i.e. national treatment and MFN, are designed to eliminate unfair trade and conditions between the Members of the WTO and to support fair competition. It is questionable whether this is the case under Article 11 of the Gas Market Directive, which places third country companies in a less favourable position than that of WTO Members, i.e. EU Member States.

The certification criteria laid down in Article 11 of the Gas Market Directive consist of two aspects: unbundling of transmission systems and TSOs<sup>209</sup> as well as a risk assessment in relation to security of supply.<sup>210</sup> From a WTO non-discrimination viewpoint, domestic certification procedures do not cover a risk assessment, which can be seen as discriminating against third

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<sup>206</sup> GATS is available at [https://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](https://www.wto.org/english/docs_e/legal_e/26-gats.pdf) (last accessed on 20 June 2019).

<sup>207</sup> Cottier, Matteotti-Berkutova and Nartova 2010, p. 8.

<sup>208</sup> Article 2 of GATS states as follows:

‘1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.  
2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.  
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.’

<sup>209</sup> Gas Market Directive, Article 11(3)(a).

<sup>210</sup> Gas Market Directive, Article 11(3)(b).

country companies, as they are placed in an unfavourable position as compared to domestic companies. However, Article XVI of GATS does not cover energy services as a specific commitment covered by the national treatment scheme. Due to this, WTO obligations regarding national treatment are not violated, as EU has not included transmission services as specific commitments.<sup>211</sup> The MFN principle may, in certain situations, entail discrimination where third country TSOs are treated differently, i.e. where one company is allowed market access under the unbundling scheme, but fails a risk assessment regarding security of supply, while another company is not allowed market access despite passing the risk assessment.<sup>212</sup>

The discriminatory aspect has also been noted by the Nord Stream 2 project company, which has threatened to sue the EU under the ECT.<sup>213</sup> The company argues that if the derogation scheme is not applicable to Nord Stream 2, the measures are discriminatory, under the ECT, in relation to the project investors.<sup>214</sup> The ongoing amendment procedure in respect of the Gas Market Directive does have a discriminatory feature viewed from the perspective of WTO regulations and the ECT in terms of the way it puts certain infrastructures and sources of origin in different positions. In the light of the fact that the Nord Stream 2 project can, for example, increase competition on the EU market by providing competitive gas, the removal or hindrance to the utilisation of a derogation in respect of this single project can be seen as discriminatory, as the purpose of the derogation scheme is to provide a system where projects capable of competing on the market are entitled not to be bound by certain gas market rules.

### 5.3.2 General EU law

The brief assessment of WTO law set out above indicates that Article 11 of the Gas Market Directive does not secure the relevant criteria under GATS and may be seen as discriminating against third countries in the EU gas field. This article is assessed below by reference to EU law on non-discrimination.

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<sup>211</sup> Cottier, Matteotti-Berkutova and Nartova 2010, p. 11.

<sup>212</sup> *ibid.*, pp. 11-12.

<sup>213</sup> See, e.g. <https://www.politico.eu/article/nord-stream-2-threatens-to-take-the-eu-to-court-over-new-gas-rules> (last accessed on 20 June 2019).

<sup>214</sup> Letter from Matthias Warnig, CEO at Nord Stream 2 AG to President Jean-Claude Juncker of the European Commission, dated 12 April 2019.

Non-discrimination under EU law rests on the decisions of the CJEU,<sup>215</sup> which has stated that the principle of equality<sup>216</sup> ‘is one of the fundamental principles of Community law’.<sup>217</sup> The essence of this principle is that different treatment is not justified where the circumstances are equal. However, differences in treatment may be justified in circumstances where ‘it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment’.<sup>218</sup> The examination of Article 11 in the light of the underlying politics indicates that it is questionable whether different treatment can be justified based on this exemption from the non-discriminatory principle. First, use of this exemption may be justified on the basis of the unbundling scheme, in which regard the EU gas market must be ‘protected’ from the abuse of dominant positions, which would be possible if third country companies were able to acquire large market shares. On the other hand, use of this exemption from the application of non-discrimination rules is against international trade rules, covering such issues as investment rights, as Article 11 complicates third country investments by allowing different treatment from other WTO Members.

The outcome of the examination of non-discrimination under EU and international law strongly supports the fact that the EU’s actions in respect of Lex Nord Stream 2 and Lex Gazprom have a discriminatory nature. This is supported by the fact that EU energy law has not been used for comparable import pipelines before. It is given further weight by the Commission’s actions, in terms of, for example, seeking to grant derogation rights for certain pipelines only, and the competence shift to the EU this amendment would bring about. In sum, it is certain that the derogation regime would be complicated in practice, based on the wording of Article 49a as examined above. While Article 11 of the Gas Market Directive already has a discriminatory nature due to the fact that it grants Member States a certain right to refuse a third country company access to the EU internal gas market, this amendment further challenges non-discrimination under EU as well as international law. Accordingly, the Nord Stream 2 project

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<sup>215</sup> See, e.g., Kruimer 2011.

<sup>216</sup> See Hannah Kruimer, *The Non-Discrimination Obligation of Energy Network Operators: European Rules and Regulatory Practice* (Intersentia 2013) for discussion of the differences between non-discrimination and the general principle of equal treatment.

<sup>217</sup> *VEMW and Others*, paragraph 47.

<sup>218</sup> Judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, ECLI:EU:C:2008:728, paragraph 47.

company has threatened to sue the EU over the measures that prevent application of the derogation regime to the pipeline, based on the dispute settlement scheme under the ECT, as mentioned above.<sup>219</sup>

#### 5.4 Outcome and solution?

The examination of the relationship between law and politics in the energy field and the discriminatory nature of certain actions as covered above is not, and should not be, the way in which EU energy law is established. This strongly concerns market access legislation, as discriminatory legislation goes against the fundamental principles of EU and international law. From a theoretical legal and political perspective, as discussed in the introductory chapter, the means aspect of Cerar's division is strongly displayed here, although the obstacle aspect should, in my view, be exposed in order for the relationship to better keep the objectives in line with the realities of the issues at hand.

The means aspect, in which political actors regard law as a tool by which to secure the underlying interests, may be viewed as being strongly present in the case studies discussed above. Assessment of these cases makes it clear that the politics behind market access treatment impact the legislative measures taken at EU level as a tool to secure certain objectives, whether or not these goals have legal support. Regardless of the legality or otherwise of such discriminatory measures, the law does not necessarily offer the best means for the relevant politics to thrive, but does offer a framework in which they can find concrete expression. This can be seen in the assessment of Nord Stream 2, in which the trilogue arrived at an agreement that can be seen as a compromise where the objectives attained are not fully in the interests of any party. As discussed in the introductory chapter, politics give law its substance and political goals can be actualised to the extent allowed by law. In the context of this study, law cannot be regarded as providing a framework through which to actualise such political interests, due to the discriminatory nature of the legal actions undertaken.

In order for a solution to be found in any given situation, the obstacle element of Cerar's division can, and should, act as a barrier that allows political goals to thrive by interacting with

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<sup>219</sup> See, e.g., <https://www.politico.eu/article/nord-stream-2-threatens-to-take-the-eu-to-court-over-new-gas-rules/> (last accessed on 20 June 2019).



fundamental legal principles, in which respect the law is not merely a tool through which political goals may be realised. As discussed above, unfair treatment is not supported from a legal standpoint and should not be allowed to support the realisation of discriminatory actions. Instead, political and legal objectives must be balanced to avoid illegal actions, while also offering a legal framework through which political goals may be realised in a manner that is valid in terms of the means offered within a democratic system. In practice this entails open participation in EU law-making, as covered in chapter 2. Participation in the legislative process not only enhances the EU's democratic objectives, but also provides relevant information that allows the legislators to gain the insights needed in order to tailor the legislative steps taken to achieve the goals at hand in the most effective manner. As Lex Nord Stream 2 indicates, this process has not functioned well enough, since the Commission's legislative actions are partly wrong, as covered above. The openness to influence, provided for under Article 11 TEU, extends to third country stakeholders.<sup>220</sup> This not only allows the EU to receive important information through third country participation, but also enhances legal certainty at international level due to the fact that EU law, although not applicable outside the EU per se, has an impact on stakeholders outside the EU.<sup>221</sup>

Within free EU energy markets, market actors must be treated equally. This extends to market access, although internal market interests may be taken into consideration when choosing trading partners. This process must, in turn, be based on internal market rules, as well as applicable legal principles such as legal certainty and legitimate expectations. However, in the Nord Stream 2 case, a situation has developed where there is a clear aim to block Russia, a trading partner, from access to the EU market. From a legal point of view, market access ought to be based on the regulations in force in order to meet the legitimate expectations of the market actors. The fact that the EU seeks to adopt new rules in order to alter market custom, and thus cause uncertainty as to the functioning of the market, cannot be viewed as legally sustainable. Furthermore, when one adds this consideration to the fact that several actors currently provide gas to the EU and have market access on the basis of the current legislation and, more interestingly, without there being any concern as to the functioning of the market, one is led to

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<sup>220</sup> Korkea-Aho 2016, p. 63.

<sup>221</sup> Korkea-Aho 2016, p. 55. Here Korkea-Aho uses the REACH legislation as an example of the impact EU law may have on actors based outside the EU.

the conclusion that the legal actions being taken cannot be regarded as being based on legal certainty and legitimate expectations from the point of view of the actors that are adversely affected by the legislative changes in progress. It was not until the Nord Stream 2 project was in the planning phase that the EU started taking action to ‘fix an invisible problem’, i.e. by drafting the proposal for amendment of the Gas Market Directive. The EU has stated that this was not intended to block the Nord Stream 2 project, but this is contradicted by the documents discussed above.

As mentioned above, equal treatment should thrive in the EU gas market. While the present situation is not free from discriminatory rules, making the laws and practices concerning the market even more discriminatory, based on one single project – albeit one that will have a substantial impact on Europe’s natural gas supply – is even more discriminatory. In this context, fair treatment is on the line. EU Member States are free to act on the energy market, i.e. to conclude energy supply agreements with third countries. The proposed legislative amendment under which an IGA would be required in order for natural gas pipelines to the EU internal market to be developed would have led to a shift of powers from Member States to the EU, as described above.<sup>222</sup> This shift would have meant that the EU natural gas market would be led by the EU institutions instead of being subject to shared competence system currently in operation. This, again, may be viewed as a rather radical way of seeking to influence a single project, where other mechanisms exist to deal with the issue. In relation to the Nord Stream 2 project, it is questionable whether equal treatment is being applied by the EU. The Third Energy Package has not been applied to the handful of existing and operating pipelines to the EU from third countries.<sup>223</sup> These pipelines are similar to the Nord Stream 2 pipeline (and the Nord Stream pipeline is almost identical to Nord Stream 2).

While energy projects are of vital interest and importance for the EU and its Member States, political discussions will take place regardless of the identity of the owner or supplier of the

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<sup>222</sup> See also Bent Ole Gram Mortensen, ‘New Gas Market Directive will change balance of power between EU and Member States’, *Energy Post*, 10 April 2018, available at <https://energypost.eu/new-gas-market-directive-will-change-balance-of-power-between-eu-and-member-states/> (last accessed on 24 June 2019); and Danila Bochkarev, ‘Commission’s gas market proposal is an attempt to gain more control of energy policy’, *Energy Post*, 6 June 2018, available at <https://energypost.eu/commissions-gas-market-proposal-is-an-attempt-to-gain-more-control-of-energy-policy/> (last accessed on 24 June 2019).

<sup>223</sup> The Transmed, Medgaz, Greenstream and Mafhreb pipelines deliver gas to the border of the EU internal market from third countries.

other end of the line. However, in view of its complicated history – dating back to the 20<sup>th</sup> century in some cases and more recently in others – with some European countries, Russia is likely to face substantial opposition from various countries. This stems from such events as the invasion of certain European countries as well as other crises between European countries and Russia. While this is the reality of politics, and is visible in the energy field, it is an issue that damages the functioning of the EU internal market. Therefore, it not only prejudices market access for Russia-based companies, but also other actors' interests more broadly.

## **6 CONCLUSION**

Examination of the impact of politics on the development of certain legislative norms relating to third country companies' access to the EU natural gas market shows that politics play a significant role in shaping the relevant EU energy law. There are several reasons for this, as examined above. The EU's dependency on external sources of natural gas has led to issues based on EU energy law as well as the underlying politics. The EU's objective in respect of supply involves an effort to diversify sources of gas. At the same time it seeks to provide the EU gas market with affordable gas. These two objectives are in conflict in the context of EU-Russia politics and this fact manifests itself strongly in respect of market access for third country companies. Not only has this led to arguments against the Nord Stream 2 project, which offers the prospect of cutting certain tariff costs in providing competitively priced gas to the EU market, but it has also proven that the EU legislator has, to the extent examined above, disregarded the fundamental principle of non-discrimination. This is apparent from the examination both of Lex Nord Stream 2 and Lex Gazprom, in respect of both of which the EU's objectives in relation to diversification has been permitted to outweigh the discriminatory aspects of its approach to market access. The way in which the Commission has acted, as a result of pressure exerted by certain Member States as well as, for example, the U.S., in seeking to block the Nord Stream 2 project, appears to be incorrectly based on objectives that run counter to both EU and international law. While non-discrimination should be the starting point in the elaboration of EU legislation, it must also be based on relevant considerations and verified fact. This has not occurred in relation to the amendment of the Gas Market Directive, in respect of which the Commission has searched energetically for problems that do not exist in order to be able to argue in favour of amendment.

The discriminatory aspects in the case studies above show that the EU is capable of going beyond market realities and facts to support its energy objectives and to block, or at least hinder, third country companies from accessing its internal gas market. This should not, and cannot, be the way in which the EU safeguards its market goals, as it has put certain actors that provide gas to the internal market in different situations from other actors, when the objective conditions are equal. The problematic aspects of the EU's legislative actions are apparent as legislators have not been able to produce a solution in respect of Lex Nord Stream 2, and the Commission's proposals have been criticised by legal scholars, certain Member States and EU institutions such as the Council itself (in the form of its Legal Services arm). As this legislative proposal may be regarded as seeking to secure EU energy objectives, the Commission's approach is simply wrong: there are other ways in which these objectives can be secured, such as, for example, invoking the mechanisms provided for in the Third Energy Package. The ability to choose which companies are entitled to supply gas to the internal market allows the EU and its Member States to ignore political threats that might be made in the future. The Commission's legislative actions are, accordingly, disproportionate, taking into consideration their discriminatory features and the strategy of securing certain interests by blocking one project from entering the market, against previously followed custom.

## References

### *Literature and articles*

Aad Correljé, ‘The European Natural Gas Market’, [2016] 3(1-2) Springer International Publishing, pp. 28-34

Adrien de Hauteclouque and Nicole Ahner, “‘Opt-Out’ Clauses for EU Energy Islands in the Third Liberalisation Package: Striking Balances?’, in Bram Delvaux, Michael Hunt and Kim Talus (eds.), *EU Energy Law and Policy Issues* (4<sup>th</sup> edn, Intersentia 2014), pp. 3-23

Ágoston Csanád Mohay, ‘The European Parliament as a litigant before the European Court of Justice’, [2006] 5, pp. 313-332

Alan Riley, ‘A Pipeline Too Far? EU Law Obstacles to Nordstream 2’, [2018] *International Energy Law Review*

Alan Riley, ‘Nord Stream 2: A Legal and Policy Analysis’, [2016/151] *CEPS Special Report*

Alan Riley, ‘Nord Stream 2: Understanding the Potential Consequences’, [2018] Atlantic Council: Global Energy Center

Alexander Larry, ‘Law and Politics: What Is Their Relation?’, [2018] 41(1) *Harvard Journal of Law & Public Policy*, pp. 355-363

Alex Barnes, ‘A bigger role for gas in the EU energy mix?’, [2017] *Energy World*

Alex Barnes, ‘EU Gas Market is competitive’, [2017] World Energy Council

Alex Barnes, ‘Nord Stream 2 – Friend or enemy of energy security in Europe?’, [2017/46] *CEPS Policy Insights*

Ana Stanic, ‘New EU Rules on the Internal Energy Market and Energy Policy’, [2011] 9(5) *Oil, Gas & Energy Law Intelligence*, pp. 1-9

Arnoud Willems, Jung-ui Sul and Yohan Benizri, ‘Unbundling As a Defence Mechanism Against Russia: Is the EU Missing the Point?’, [2009] 7(2) *Oil, Gas & Energy Law Intelligence*

Brian Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, [2008] St. John’s School of Law

Bruno de Witte, ‘The Decision-Making Process’, in D. Patterson and A. Södersten (eds.), *A Companion to European Law and International Law* (John Wiley & Sons, Inc. 2016), pp. 95-108

David Bostock, ‘Coreper Revisited’ [2002] 40(2) *Journal of Common Market Studies*, pp. 215-234

David Coen and Jeremy Richardson, *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009)

David Haverbeke, Barbara Naesens and Wouter Vandorpe, ‘European Energy Markets and the New Agency for Cooperation of Energy Regulators’, [2010] 28(3) *Journal of Energy & Natural Resources Law*, pp. 403-430

David Marshall, 'Who to lobby and when: Institutional determinants of interest group strategies in European Parliament committees', [2010] 11(4) *European Union Politics*, pp. 553-575

Emilia Korkea-Aho, "'Mr Smith Goes To Brussels": Third Country Lobbying and the Making of EU Law and Policy', *Cambridge Yearbook of European Legal Studies*, Vol 18, December 2016, pp. 45-68

Fiona Hayes-Renshaw, 'Least Accessible but not Inaccessible: Lobbying the Council and the European Council', in David Coen and Jeremy Richardson (eds.), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009), pp. 70-88

Francis G. Jacobs, 'The Lisbon Treaty and the Court of Justice', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon* (Oxford University Press 2012), pp. 197-212

Guy Cutlip, 'The History of Law', [1925] 59(3) *American Law Review*, pp. 361-392

Hannah Kruimer, 'Exemptions to the Principle of Equal Access: An Overview of CJEU Cases by H. T. Kruimer', [2011] 9 (5) *Oil, Gas & Energy Law Intelligence*

Hannah Kruimer, *The Non-Discrimination Obligation of Energy Network Operators: European Rules and Regulatory Practice* (Intersentia 2013)

Jerzy Dudek and Andris Piebalgs, 'Nord Stream 2 and the EU Regulatory Framework: Challenges Ahead', [2017/26] European University Institute

Kaius Ervasti, 'Oikeussosiologia ja oikeuspoliittinen tutkimus osana oikeustiedettä' [2011] *Oikeustiede-Jurisprudentia XLIV*, Suomalainen lakimiesyhdistys, pp. 61-132

Kim Talus, 'EU Gas Market Amendment – Despite Compromise, Problems Remain' [2019], *Oil, Gas & Energy Law Intelligence*

Lena Sandberg and Lyndy Davies, 'The relevant product market – Gas', in Christopher Jones (ed.), *EU Energy Law, Volume II: EU Competition Law and Energy Markets* (4<sup>th</sup> edn, Claeys & Casteels 2016), pp. 105-123

Maja Kluger Rasmussen, 'The Battle for Influence: The Politics of Business lobbying in the European Parliament', [2015] 53(2) *Journal of Common Market Studies*, pp. 365-382

Miro Cerar, 'The Relationship Between Law and Politics', [2009] 15(1) *Annual Survey of International & Comparative Law*, pp. 19-41

Morris Cohen and Felix Cohen, 'Readings in Jurisprudence and Legal Philosophy', [1951] *Law and Politics*, pp. 860-927

Neill Nugent, *The European Commission* (Palgrave 2001)

Nikos Vogiatzis, 'The linguistic policy of the EU institutions and political participation post-Lisbon', [2016] 41(2) *European Law Review*, pp. 176-200

Nils Ringe, *Who Decides, and How?: Preferences, Uncertainty, and Policy Choice in the European Parliament* (Oxford University Press 2009)

Pieter Bouwen and Margaret McCown, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union', [2007] 14(3) *Journal of European Public Policy*, pp. 422-443

Pieter Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access', [2002] 9(3) *Journal of European Public Policy*, pp. 365-390

Pieter Bouwen, 'The European Commission', in Jeremy Richardson and David Coen (eds.), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009), pp. 19-38

Rafael Leal-Arcas and Jan Wouters (eds.), *Research Handbook on EU Energy Law and Policy* (Edward Elgar Publishing Limited 2017)

Raul Narits, 'Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts', [2007] *Juridica International*

Richard Corbett, 'The Evolving Roles of the European Parliament and of National Parliaments', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon* (Oxford University Press 2012), pp. 248-261

Stephen Vitkovitch, 'Assessing the European Parliament's Democratic Credentials', [2015] 15(4) *Romanian Journal of European Affairs*, pp. 5-25

Stijn Smismans, 'Regulating interest group participation in the European Union: changing paradigms between transparency and representation', [2014] 39(4) *European Law Review*, pp. 470-492

Thomas Cottier, Sofya Matteotti-Berkutova and Olga Nartova, 'Third Country Relations in EU Unbundling of Natural Gas Markets: The "Gazprom Clause" of Directive 2009/73 EC and WTO Law', [2010/06] *World Trade Institute*

Wilhelm Lehmann, 'The European Parliament', in Jeremy Richardson and David Coen (eds.), *Lobbying the European Union: Institutions, Actors, and Issues* (Oxford University Press 2009), pp. 39-69

### **Internet sources**

Anouk Honoré, 'Natural gas demand in Europe in 2017 and short term expectations', *Oxford Energy Insight* 35, April 2018, Institute for Energy Studies, April 2018: <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/04/Natural-gas-demand-in-Europe-in-2017-and-short-term-expectations-Insight-35.pdf> (last accessed on 24 June 2019)

Annex V of the European Parliament's Rules of Procedure, 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20180731+0+DOC+PDF+V0//EN&language=EN> (last accessed on 22 June 2019)

Bent Ole Gram Mortensen, 'New Gas Market Directive will change balance of power between EU and Member States', *Energy Post*, 10 April 2018, available at <https://energypost.eu/new->

gas-market-directive-will-change-balance-of-power-between-eu-and-member-states/ (last accessed on 24 June 2019)

Briefing, 'EU Legislation in Progress: Common rules for gas pipelines entering the EU internal market', 23 January 2019, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614673/EPRS\\_BRI\(2018\)614673\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614673/EPRS_BRI(2018)614673_EN.pdf) (last accessed on 24 June 2019)

Comments on the Council's Rules of Procedure: European Council's and Council's Rules of Procedure 2016, available at <https://www.consilium.europa.eu/media/29824/qc0415692enn.pdf> (last accessed on 22 June 2019)

Committee on Industry, Research and Energy, 'Diversification of energy routes and suppliers: an essential complementary measure for the success of the EU Energy Union objectives', 23 February 2017, available at [http://www.politico.eu/wp-content/uploads/2017/02/8704\\_Buzek\\_Energy-Council\\_NS2\\_HK\\_SCAN-2.pdf](http://www.politico.eu/wp-content/uploads/2017/02/8704_Buzek_Energy-Council_NS2_HK_SCAN-2.pdf) (last accessed on 22 June 2019)

Danila Bochkarev, 'Commission's gas market proposal is an attempt to gain more control of energy policy', *Energy Post*, 6 June 2018, available at <https://energypost.eu/commissions-gas-market-proposal-is-an-attempt-to-gain-more-control-of-energy-policy/> (last accessed on 24 June 2019).

Energy Union Package, COM(2015) 80 final, 25.02.2015, available at [https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF) (last accessed on 20 June 2019)

European Commission – Press release: 'Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2', 9 June 2017, available at [europa.eu/rapid/press-release\\_IP-17-1571\\_en.pdf](http://europa.eu/rapid/press-release_IP-17-1571_en.pdf) (last accessed on 22 June 2019)

European Commission – Press release, 'Energy Union: Commission takes steps to extend common EU gas rules to import pipelines', 8 November 2017, available at [europa.eu/rapid/press-release\\_IP-17-4401\\_en.pdf](http://europa.eu/rapid/press-release_IP-17-4401_en.pdf) (last accessed on 22 June 2019)

EU Reference Scenario 2016, 'Energy, transport and GHG emissions, Trends to 2050', available at [https://ec.europa.eu/energy/sites/ener/files/documents/20160713%20draft\\_publication\\_REF2016\\_v13.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/20160713%20draft_publication_REF2016_v13.pdf) (last accessed on 22 June 2019)

European Parliament resolution of 15 December 2015 on Towards a European Energy Union (2015/2113(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0444+0+DOC+PDF+V0//EN> (last accessed on 22 June 2019)

European Parliament Rules of Procedure, 2014-2019, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20180731+0+DOC+PDF+V0//EN&language=EN> (last accessed on 20 June 2019)



Gaurav Sharma, 'Opposition to Nord Stream 2 ignores market fundamentals', 14 December 2018, *Energy Post*, available at <https://energypost.eu/opposition-to-nord-stream-2-ignores-market-fundamentals-energy-post-weekly/> (last accessed on 20 June 2019)

'Gazprom clause' issues Russia ultimatum for energy co-operation, 2007, available at <https://www.euractiv.com/section/med-south/news/gazprom-clause-issues-russia-ultimatum-for-energy-co-operation/> (last accessed on 21 June 2019)

General Secretariat of the Council: European Council meeting (17 and 18 December 2015) – Conclusions, EUCO 28/15, available at <https://www.consilium.europa.eu/media/21669/201512-euco-conclusions.pdf> (last accessed on 22 June 2019)

Handbook on the Ordinary Legislative Procedure (European Parliament 2017), available at <http://www.epgencms.europarl.europa.eu/cmsdata/upload/10fc26a9-7f3e-4d8a-a46d-51bdadc9661c/handbook-olp-en.pdf> (last accessed on 18 June 2019)

Letter from Matthias Warnig, CEO of Nord Stream 2 AG to President Jean-Claude Juncker of the European Commission, dated 12 April 2019, available at <https://www.politico.eu/wp-content/uploads/2019/04/Nord-Stream-2-ECT-letter-legal.pdf> (last accessed on 22 June 2019)

'Natural gas demand in Europe in 2017 and short term expectations' (Oxford Institute for Energy Studies, April 2018), available at <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/04/Natural-gas-demand-in-Europe-in-2017-and-short-term-expectations-Insight-35.pdf> (last accessed on 22 June 2019)

Prognos 2017, 'Final Report - Current Status and Perspectives of the European Gas Balance: Analysis of EU 28 and Switzerland, available at [https://www.prognos.com/uploads/tx\\_atwpubdb/20170406\\_Prognos\\_study\\_European\\_Gas\\_Balance\\_final\\_1\\_01.pdf](https://www.prognos.com/uploads/tx_atwpubdb/20170406_Prognos_study_European_Gas_Balance_final_1_01.pdf) (last accessed on 22 June 2019)

Radio Free Europe, 'U.S. House Of Representatives Condemns Russia's Nord Stream 2 Pipeline', 12 December 2018, available at <https://www.rferl.org/a/u-s-house-of-representatives-condemns-russia-s-nord-stream-2-pipeline/29651530.html> (last accessed on 24 June 2019)

'Russian Gas Transit Across Ukraine Post-2019: pipeline scenarios, gas flow consequences, and regulatory constraints', February 2016, available at <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Russian-Gas-Transit-Across-Ukraine-Post-2019-NG-105.pdf> (last accessed on 24 June 2019)

Severin Fischer, 'Lost in regulation: the EU and Nord Stream 2', 13 November 2017, *Energy Post*, available at <https://energypost.eu/lost-in-regulation-the-eu-and-nord-stream-2/> (last accessed on 22 June 2019)

Simon Frédéric, 'Europe grapples with Dutch gas production "collapse"', [2018] *Euractiv*, available at <https://www.euractiv.com/section/energy/news/europe-grapples-with-dutch-gas-production-collapse/> (last accessed on 22 June 2019)

Simon Taylor, 'EU struggles to agree on anti-Gazprom clause', [2008] *Politico*, available at <https://www.politico.eu/article/eu-struggles-to-agree-on-anti-gazprom-clause/> (last accessed on 21 June 2019)

Strategic Plan of the Commission's DG Energy for 2016-2020, available at [https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-ener\\_may2016\\_en.pdf](https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-ener_may2016_en.pdf) (last accessed on 20 June 2019)

'Nord Stream 2 and Ukraine: Costs Should Decide', National Energy Security Fund, 2016, available at [https://brusselsenergyclub.org/get\\_file/id/nord-stream2final.pdf](https://brusselsenergyclub.org/get_file/id/nord-stream2final.pdf) (last accessed on 24 June 2019)

The Oxford Institute for Energy Studies, 2018. 'Gazprom in Europe – two “Anni Mirabiles”, but can it continue?', available at <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/03/Gazprom-in-Europe-%E2%80%93-two-Anni-Mirabiles-but-can-it-continue-Insight-29.pdf> (last accessed on 22 June 2019)

Tobias Buck, 'Nord Stream 2: Gas pipeline from Russia that's dividing Europe' [2018] The Irish Times, available at <https://www.irishtimes.com/news/world/europe/nord-stream-2-gas-pipeline-from-russia-that-s-dividing-europe-1.3571552> (last accessed 25 June 2019).

### ***Case-law***

Judgment of 29 March 2007, *Aktiebolaget NN*, C-111/05, ECLI:EU:C:2007:195

Judgment of 16 December 2008, *Arcelor Atlantique and Lorraine and Others*, C-127/07, ECLI:EU:C:2008:728, paragraph 47

Judgment of 7 June 2005, *VEMW and Others*, C-17/03, ECLI:EU:C:2005:362

Case No COMP/M.5649 – RREEF FUND/ ENDESA/UFG/ SAGGAS 21.10.2009, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m5649\\_20091021\\_20310\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5649_20091021_20310_en.pdf) (last accessed on 24 June 2019)

WTO dispute: European Union and its Member States – Certain Measures Relating to the Energy Sector, Request for the Establishment of a Panel by the Russian Federation, WT/DS476/2, 28 May 2015

WTO dispute: Panel Report, *European Union and its Member States — Certain Measures Relating to the Energy Sector (EU – Energy Package)*, WR/DS476/R, circulated to Members on 10 August 2018, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/476r\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/476r_e.pdf) (last accessed on 25 June 2019)

### ***Legislative documents***

Bundesnetzagentur letter to Directorate-General for Energy, European Commission, 3 March 2017, available at <https://euractiv.eu/wp-content/uploads/sites/2/2017/03/German-regulator-on-Nord-Stream-2.pdf> (last accessed on 22 June 2019)

Communication to the Commission from President Juncker and First Vice-President Timmermans, 'Governance in the European Commission' (11.10.2017) C(2017) 6915 final, available at [https://ec.europa.eu/info/sites/info/files/c\\_2017\\_6915\\_final\\_en.pdf](https://ec.europa.eu/info/sites/info/files/c_2017_6915_final_en.pdf) (last accessed on 22 June 2019)

Council of the European Union, Opinion of the Legal Service on a Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues, 27 September 2017, available at <http://www.politico.eu/wp-content/uploads/2017/09/SPOLITICO-17092812480.pdf> (last accessed on 22 June 2019)

Council of the European Union, Recommendation for a Council Decision authorising the opening of negotiations of an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline, 12 June 2017, available at <http://www.politico.eu/wp-content/uploads/2017/07/NS-Draft-Mandate.pdf> (last accessed on 22 June 2019)

European Commission – Fact Sheet, Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC), 8 November 2017, available at [europa.eu/rapid/press-release\\_MEMO-17-4422\\_en.pdf](http://europa.eu/rapid/press-release_MEMO-17-4422_en.pdf) (last accessed on 22 June 2019)

European Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 8 November 2017, Brussels, COM(2017) 660 final

European Commission, letter from Vice President of the European Commission M. Šefčovič and Member of the European Commission M. A. Cañete. (12 September 2017) to J. Buzek, Chair of the European Parliament Committee on Industry, Research and Energy, ‘Request pursuant to the Framework agreement – Nord Stream 2’, available at <http://www.politico.eu/wp-content/uploads/2017/09/NS2-SPOLITICO-17091912000.pdf> (last accessed on 22 June 2019)

General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 9 January 2019, available at [https://www.politico.eu/wp-content/uploads/2019/01/SPOLITICO-19011118350.pdf?utm\\_source=POLITICO.EU&utm\\_campaign=3a0af18451-EMAIL\\_CAMPAIGN\\_2019\\_01\\_13\\_07\\_09&utm\\_medium=email&utm\\_term=0\\_10959edeb5-3a0af18451-190118429](https://www.politico.eu/wp-content/uploads/2019/01/SPOLITICO-19011118350.pdf?utm_source=POLITICO.EU&utm_campaign=3a0af18451-EMAIL_CAMPAIGN_2019_01_13_07_09&utm_medium=email&utm_term=0_10959edeb5-3a0af18451-190118429) (last accessed on 22 June 2019)

General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – Mandate for negotiations with the European Parliament, 11 February 2019, available at <https://data.consilium.europa.eu/doc/document/ST-5874-2019-REV-1/en/pdf> (last accessed on 22 June 2019)

General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas – Analysis of the final compromise text with a view to agreement, 14 February 2019, available at <https://data.consilium.europa.eu/doc/document/ST-6351-2019-INIT/en/pdf> (last accessed on 22 June 2019)

General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 21 November 2018, available at <http://data.consilium.europa.eu/doc/document/ST-14560-2018-INIT/en/pdf> (last accessed on 21 June 2019)

Opinion of the Council's Legal Service on Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC - compatibility with UNCLOS, 1 March 2018, available at <https://www.politico.eu/wp-content/uploads/2018/03/NS2-Gas-Legal-Opinion-March-2018.pdf> (last accessed on 22 June 2019)

Opinion of the Council's Legal Service on a Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas - Legal basis, allocation of competences, derogations, 26 March 2018, available at <https://www.euractiv.com/wp-content/uploads/sites/2/2018/03/2Opinion-Council-LS-EC-amendment-3rd-Gas-Directive.pdf> (last accessed on 22 June 2019)

Opinion of the European Committee of the Regions — Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (2018/C 361/09) (OJ C 361, 5.10.2018, p. 72)

Protocol (No 1) on the Role of National Parliaments in the European Union

Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

UN Espoo Convention on Environmental Impact Assessment in a Transboundary Context 1997, available at [https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo\\_Convention\\_authentic\\_ENG.pdf](https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf) (last accessed on 24 June 2019)